Regency Service Carts, Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 29–CA–24174

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 27, 2002, Administrative Law Judge Steven Fish issued the attached decision.[*] The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed limited cross-exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein, and to adopt the recommended Order as modified.

1. Surface Bargaining

We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union. In doing so, we rely on the analysis set forth herein.

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." "Both the employer and the union have a duty to negotiate with a 'sincere purpose to find a basis of agreement," *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)), but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." Id. (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.3d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). The employer is, nonetheless, "'obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all." Ibid. (Emphasis in original.). Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. Id.; *Pease Co.*, 237 NLRB 1069, 1070 (1978).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296

[*] We correct the following errors in the judge's decision: "her" at 2:27 should read "his"; "Rosaci was the chief spokesperson for Respondent" at 6:38-39 should read "Rosaci was the chief spokesperson for the Union"; "10:30 p.m." at 8:39 should read "10:30 a.m."; "than" at 8:50 should read "them"; "inquires" at 8:51 should read "inquiries"; "violations" at 9:16 should read "vacations"; "proposes" at 9:17 should read "proposals"; "NYSFRB" at 10:2, 6, and 11 should read "NYSERB"; "inter-rated" at 10:33 should read "inter-related"; "than" at 10:45 should read "that"; "fro" at 11:46 should read "from"; "from" at 13:13 should read "form"; "January 7, 1999" at 16:9 should read "January 4, 1999"; "December 17, 1998" at 16:16 should read "December 21, 1998"; "export" at 16:23 should read "expert"; "discuss with those types" at 19:20 should read "discuss those types"; "fro" at 20:12 should read "from"; "Marcy" at 20:46 should read "March"; "eriction" at fn. 9 should read "erection"; "March 16, 1999" at 21:1 should read "March 12, 1999"; "20%" at 22:19 should read "80%"; "March 31, 20001" at 23:1 should read "March 31, 1999"; "the" at 26:9 should read "then"; "must had" at 27:10 should read "must have"; "propose" at 27:32 should read "proposed"; "from" at 27:49 should read "form"; "Ellen" at 30:39 should read "Ellman"; "The June 21, 1999 Meeting" at 31:18 should read "The July 21, 1999 Meeting"; "the" at 33:44 should read "then"; "Banqladesh" at 34:44 should read "Bangladesh"; "Rosaci's" at 35:47 should read "Rosaci a"; "November 12" at 36:30 should read "November 17"; "was" at 37:31 should read "with"; "she" at 37:45 should read "he"; "Shore" at 38:39 should read "Share"; "Rosaci's" at 39:20 should read "Rosaci"; "purposed" at 46:50 should read "proposed"; "want" at 47:39 should read "went"; "Respondent's" at 49:26 should read "the Union's"; "curtain" at 50:4 should read "certain"; "August 4, 2000" at 60:20 should read "August 9, 2000"; "but did say when" at 61:43 should read "but did not say when"; "He" at 62:11 should read "She"; "June 1, 2001" at 63:8 should read "June 1, 2000"; "the Union requested in writing that the Union" at 63:30 should read "the Union requested in writing that the Respondent"; "positions" at 65:14 should read "position"; "since" at 65:29 should read "such"; "in" at 67:44 should read "is"; "April 23, 2000" at 68:31-32 should read "April 11, 2000"; "whose" at 78:23 should read "where"; "fro" at 78:42 should read "from"; "board" at 80:34 should read "broad"; "Employee is laid falsifies" at 84:4 should read "Employee falsifies"; "reason" at 87:22 should read "a raise."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, supra, at 1603. From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO***,** 334 NLRB at 487**.**

The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands,[2] unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, supra, at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement. See id. at 130 fn.2.

Applying these principles to this case, we find that the totality of the Respondent's conduct throughout the negotiations demonstrates that it unlawfully endeavored to frustrate the possibility of arriving at any agreement with the Union. Not only did the Respondent make several comments indicating its bad faith, but also it employed a number of dilatory tactics aimed at frustrating negotiations between the parties. Indeed, the conduct set forth below demonstrates that the Respondent engaged in unlawful surface bargaining.

We agree with the judge that the Respondent made a number of comments that demonstrate its bad faith during the course of the negotiations. During the parties' fifth meeting, held October 28, 1998,[3] in response to the Union's request that the Respondent make its economic proposals, Respondent's negotiator Chuck Ellman said, "you want a contract, we don't." This comment demonstrated early in the negotiations the Respondent's intention to avoid reaching an agreement.

During the June 24, 1999 meeting, Ellman made several additional comments indicative of the Respondent's bad faith. First, Ellman interrupted negotiations to state, "[y]ou don't get it. You go on as long as you want, impasse is not an issue. Sooner or later, defecate or get off the pot." This statement strongly implied that the Respondent manifested no real intent to adjust differences, but essentially adopted the take-it-or-leave-it approach condemned in *General Electric Co.*, 150 NLRB 192, 196 (1964), enfd. 418 F.2d 736 (2nd Cir. 1969) ("a party who enters into negotiations 'with a predetermined resolve not to budge from an initial position'" demonstrates an attitude "inconsistent with good-faith bargaining").

At the same meeting, Ellman drew several "lines in the sand" concerning various provisions without which there would not be a contract. First, Ellman stated that the Respondent would not "agree to a contract with more than the federal minimum wage." Thereafter, in explaining the Respondent's position that the Union's information request regarding subcontracting was irrelevant, Ellman drew a red line on the back of his note pad and said, this is a "line in the sand, there won't be any contract with a prohibition on subcontracting." A few minutes later, when discussing the Respondent's proposed zipper clause, Ellman drew another red line and stated, "that will be part of the contract, too." Ellman then stated "we're not going to be reasonable. We want what we want and I'll sit here for the next three years." These comments made clear what was previously implicit: the Respondent had no intention to compromise or to settle differences; rather, it unlawfully sought agreement on its own terms and none other. See *American Meat Packing Corp.*, 301 NLRB 835, 836 (1991); see also *Altorfer Machinery*, supra, at 165 (statements that "this Company will not sign a contract with seniority," that "the management rights that we are offering you is the same management rights we offered you from day one. We haven't changed it. It is not going to change," and that "there will be no classifications or descriptions," were "phrases of farewell, should the [u]nion seek to negotiate any changes in [the employer's] initial counterproposals

[2] Chairman Battista would not evaluate the substance of the bargaining positions. Accordingly, he disavows that portion of the discussion infra regarding these matters.

Consistent with longstanding precedent, Members Liebman and Schaumber have examined the Respondent's proposals to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement. See *PSO*, supra, at 488; see also *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). This examination does not require an inquiry into whether the proposals are reasonable. See discussion infra.

[3] The charge in this case was filed on April 4, 2001 and served on the Respondent on April 16, 2001. Thus, the Sec. 10(b) period began on October 16, 2000. *Dun & Bradstreet Software Services*, 317 NLRB 84, 85 (1995). However, we consider the earlier bargaining as background in elucidating the nature of the Respondent's conduct at the table during the 10(b) period. *Tennessee Construction Co.*, 308 NLRB 763 fn.2 (1992) (citing *Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960)).

concerning those subjects," and indicative of bad-faith bargaining).

The Respondent continued to manifest its bad faith throughout the negotiations. On February 21, 2001, the parties scheduled a bargaining session for March 22, 2001. On March 1, the Respondent filed an RM petition. Shortly thereafter, the Union contacted Ellman to inquire whether the March 22 meeting was still on in view of the filing of the petition. Ellman stated that he would be willing to meet, but that he was "going to say no to everything." This comment further illustrates the Respondent's "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation." See *Mid-Continent Concrete*, 336 NLRB at 259.

The Respondent's dilatory tactics and arbitrary scheduling of meetings further establish its failure to bargain in good faith with the Union. The parties held 29 bargaining sessions between August 1998 and March 2001, a 32-month period. As the negotiations progressed, the sessions did not increase in frequency. Indeed, during the last 6 months of negotiations, the parties met only twice. The primary reason for the infrequency of the meetings was the Respondent's claimed unavailability. The Respondent cancelled eight of the 29 sessions scheduled, including the final meeting scheduled for March 22, 2001, when Ellman simply did not show up. When meetings were held, the Respondent frequently arrived late, interrupted bargaining to accept telephone calls, and left early, despite the Union's expressed desire to continue negotiating. Further, when scheduling future sessions, the Respondent consistently refused dates suggested by the Union, preferring to meet after the last date the Union provided.[4] Additionally, the Respondent's unwillingness to provide explanations for its proposals and refusal to inform the Union as to current shop practices also impeded the negotiations. These dilatory tactics are indicative of the Respondent's surface bargaining and constitute violations of its obligation to bargain in good faith. See *Mid-Continent Concrete*, supra, at 260–261 (refusal to provide explanations for proposals and orchestrated delay tactics were evidence of bad-faith bargaining); see also *People Care, Inc.*, 327 NLRB 814, 825 (1999) (respondent's unreasonable refusal to accede to union's requests for more frequent meetings was evidence of bad-faith bargaining) (citing *Calex Corp.*, 322 NLRB 977 (1997), enfd. 144 F.3d 904 (6th Cir. 1998)); see also *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995) (finding, inter alia, respondent's canceling of bargaining sessions, limiting the duration of meetings, and delaying the scheduling of future meetings indicative of bad-faith bargaining).

The Respondent's initial responses to several of the Union's relevant information requests also impeded bargaining and are evidence of the Respondent's bad faith.[5] Throughout negotiations, Ellman consistently demanded that the Union ask the employee members of its bargaining committee to answer the Union's inquiries about current conditions of employment, including vacation, training, pay for voting, and outside work. Although Ellman would eventually provide the information when the Union insisted on it, his initial responses unduly delayed bargaining. The Union was compelled to explain repeatedly that the committeemen often did not know the Respondent's plant-wide policies, and then to follow up with additional requests for the same information.

In response to other requests for relevant information, such as those concerning subcontracting, wages, and current pay policies, Ellman would claim that the information was irrelevant because the Respondent did not intend to change its position on those subjects. For example, at the June 24, 1999 meeting, when asked about subcontracting, Ellman stated that the information was irrelevant because "there won't be a contract with any limitations on subcontracting." We find that these tactics were used to frustrate negotiations and prevent the successful negotiation of a bargaining agreement.

Contrary to our dissenting colleague, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to timely supply to the Union the information that it requested on August 9, 2000, as well as the information it requested on June 1, 2000 and January 23, 2001. The applicable legal standard is straightforward: When a union makes a request for rele-

[4] For example, on June 24, 1999, the Union suggested July 5 for the next meeting. Ellman replied that he was busy until the week of July 19. The Union asked if they could schedule anything sooner, since that was 4 weeks away. Ellman replied, "[w]e haven't been accomplishing much. It doesn't matter if it's two or three or four. Can't do it anyway."

[5] Due to 10(b) limitations, the complaint alleges that the Respondent: (a) engaged in surface bargaining during the final 2 of 29 bargaining sessions, held on Nov. 28, 2000 and Jan. 10, 2001; (b) failed to timely respond to the Union's requests for relevant and necessary information; such requests were made on various dates between June 1, 2000 and January 23, 2001; the delay in complying with these requests began during, or continued into, the 10(b) period. Regarding the information requests, we adopt the judge's finding that these allegations are not time-barred by Sec. 10(b) of the Act, as the Respondent's tardy responses occurred within the 10(b) period; and we provide a remedy therefor. As noted in footnote 3, supra, and in agreement with the judge, we consider other instances of the Respondent's conduct that occurred outside of the 10(b) period as background in our analysis of the nature of the Respondent's conduct at the table on Nov. 28, 2000 and Jan. 10, 2001. See *Tennessee Construction Co.*, 308 NLRB 763 fn. 2 (1992), citing *Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 326 U.S. 411, 416 (1960).

vant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished. *Beverly California Corp.*, 326 NLRB 153, 157 (1998); *Capital Steel & Iron*, 317 NLRB 809, 813 (1995), enfd. 89 F.3d 692 (10th Cir. 1966); *Bryant & Stratton Institute*, 321 NLRB 1007, 1044 (1998), enfd. 140 F.3d 169 (2d Cir. 1998); *Quality Engineers Products*, 267 NLRB 593, 598 (1983). The Respondent did not satisfy this standard.

Here, the Respondent had submitted a contract proposal for a drug-testing policy[6] that the Union reasonably understood was modeled, at least in part, on the Federal Drug Free Workplace Act.[7] During the parties' August 9 bargaining session, Union Negotiator Rosaci requested information regarding whether the Respondent was awarded Federal government contracts subject to coverage under that Act. According to Rosaci's uncontradicted testimony, Respondent's negotiator, Ellman, responded that the Respondent "didn't say his proposal was based on the Act. . . [Respondent] didn't propose it because the employer is obligated. We just want it."[8] Rosaci explained that portions of the Respondent's drug testing proposal were contained in the Drug Free Workplace Act, and if inclusion in the bargaining agreement of those portions was necessary for Respondent to obtain Federal contracts, the Union could "change its position [regarding drug testing] more easily." Ellman refused to supply the information and offered no additional explanation for the refusal. In these circumstances, in view of Ellman's less than clear and forthright response, we do not agree with our dissenting colleague that the Union's information request failed to demonstrate the relevance of the request, or that the Respondent clearly informed the Union about its reason for not providing the information.

Further, even if Ellman's response were clear, the information was nonetheless relevant. Quite apart from *the Respondent's* basis for its proposals, the Union expressed a possible basis for *its* agreement to the proposal. That is, if the Respondent were covered by the Drug Free Workplace Act, the Union would have its own possible basis for agreeing to the proposal.[9]

Once the Union requested facially relevant and necessary information, it was the Respondent's burden to either supply the information or explain why it was not relevant. The Respondent did not then, or thereafter, provide an explanation until November 28, 2000, when it informed the Union that the Respondent had not been awarded any Federal contracts for the last 2 years and did not meet the threshold dollar amount for coverage under the Drug Free Workplace Act. Even if the Respondent was not basing its proposal on the Drug Free Workplace

[6] Drug and Alcohol testing programs and policies constitute mandatory subjects of bargaining. *Johnson-Bateman Co*., 295 NLRB 180, 182 (1989).

[7] 41 U.S.C. Sec. 701 et seq. "Drug-free workplace requirements for federal contractors." In discussing the request for information about government contracts during the parties' August 9 negotiations, Rosaci told Ellman that "portions of your [Respondent's Drug-Free Workplace] proposal are contained in the [Drug Free Workplace] Act." There is no evidence that Ellman addressed Rosaci's assertion before refusing to provide the information.

Rosaci's understanding that the Respondent's proposal was based, at least in part, on the Federal statute, was reasonable. Sec. 701(a)(2) of that statute provides that "[n]o Federal Agency shall enter into a contract with an individual unless such individual [agrees not to] engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of a contract." Echoing the Federal statutory language, Respondent's bargaining proposal provided, in pertinent part, that "[a]ny employee's [sic] who use, possess, distribute, manufacture, consume or are under the influence of drugs and/or alcohol at work . . . are subject to immediate termination.

[8] Our dissenting colleague interprets this statement thus: "Ellman promptly informed the Union that since its proposal was neither based on the Drug Free Workplace Act nor premised on its applicability to Respondent, the requested information would not be provided" and, further, "made clear to the Union that its drug testing proposal was wholly unrelated to the Act or any other federal requirement." This interpretation ascribes both a level of clarity and a meaning to Ellman's statement that cannot reasonably be found in Ellman's actual words. Ellman did *not* say that Respondent's "proposal was [not] based on the Drug Free Workplace Act;" he said "I didn't say our proposal was based on the [statute]." Ellman did *not* say that Respondent's proposal was not "premised on [the statute's] applicability;" he said "we didn't propose it because [we are] obligated . . . we just want it." Contrary to our colleague's interpretation, Ellman's actual response was equivocal and evasive, at best. He never answered the question of whether his proposal was *in fact* based on the statute. The fact that he did not *say* that it was so based does not answer the question. Similarly, the fact that he just "wanted" the proposal does not answer the question. Therefore, Ellman's response could not serve as a valid or legally sufficient rebuttal of the relevancy of the Union's information request. Rather, it was part of a pattern of Respondent's untimely and unresponsive reactions to Union information requests that infected the parties' negotiations both within and preceding the 10(b) period, a pattern described in detail in the judge's decision.

[9] In the context of collective-bargaining negotiations over the Respondent's drug-testing proposal, which was based in part on the Federal statute, the Union asked whether Respondent had been awarded Federal contracts greater than $100,000, and the dollar amount of Federal contracts Respondent bid on or was awarded over the last 3 years. As shown, the Union explained the relevance of its request. In these circumstances, we cannot agree, as either a general legal principle or a particularized ruling in this case, with our dissenting colleague's blanket pronouncement that "information regarding the dollar amounts bid on and awarded in government contracts does not directly relate to the bargaining unit members' terms and conditions of employment." Whether or not such information relates to employment terms and conditions must be determined on the facts of each case. Here, the Union's request was clearly relevant, absent a timely explanation by the Respondent sufficient to refute the relevance of the requested information. *Johnson-Bateman Co.*, supra. *SBC California*, 344 NLRB No. 11 (2005), on which our colleague relies, is inapposite, as it does not concern the relevance of contract data to the negotiations between the parties in that case.

Act, the Union said that the Union might agree to that proposal if the Respondent had government contracts which arguably fell under that Act. Thus, the information could have enhanced the prospects for agreement. The Respondent ultimately said that there were no such government contracts, but that response came almost 3 months later. Therefore, we adopt the judge's finding that by its delay in responding to the Union's August 9 request, the Respondent violated Section 8(a)(5) and (1).

Our dissenting colleague says that the information was not relevant. We disagree. Information concerning bargained matters is relevant precisely because such information can enhance the prospects for agreement.[10] Irrespective of whether the information may prompt one party to yield or the other party to do so, the information is equally relevant. Thus, the fact that the Respondent may not have based its proposal on federal requirements is not dispositive. If there were such requirements, the Union was more willing to compromise, and prospects for agreement would be enhanced. And that is precisely what the Union told the Respondent at the bargaining table. Further, and consistent with that, the Union needed to know whether the Respondent was covered by the applicable federal requirement, i.e., the Federal Drug Free Workplace Act. Indeed, the Respondent itself realized this relevance. It told the Union that it did not meet the threshold dollar amount for coverage under that Act. The problem was that the Respondent did not reveal this relevant information until November 28, almost 4 months after the August 9 request for information.

Additionally, the Respondent's delay in providing the Union with relevant information evinces its failure to bargain in good faith. The refusal to provide without undue delay requested information which is relevant to the Union's efforts at negotiating a contract is an indicium of surface bargaining. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (citing *Atlanta Hilton & Tower*, 271 NLRB 1600); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993). Throughout the negotiations, the Respondent delayed submitting requested information to the Union concerning various safety and personnel issues. In this regard, the Respondent would initially make spurious and frivolous objections to clearly relevant requests, and then finally supply the information only after repeated requests by the Union and after an unreasonable amount of time had expired. This conduct, which tainted negotiations from the outset, continued into the 10(b) period, with the Respondent unlawfully delaying the submission of information requested concerning, inter alia, an employee-training program and the Respondent's health-insurance proposal.

Finally, we find that the Respondent's actual proposals are consistent with the overall evidence of surface bargaining discussed above. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *PSO*, 334 NLRB at 487 (citing *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991)). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract. Id. at 488 (citing, inter alia, *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984)). "In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith." Id.

Examination of the Respondent's contract proposals confirms our conclusion that it failed to bargain in good faith. The proposed management-right's clause was extremely broad, granting the Respondent unfettered discretion in the creation of workplace rules and regulations and in decisions to discipline and discharge employees. Other proposed clauses would have granted the Respondent discretion to award seniority, to grant leaves of ab-

[10] Our dissenting colleague errs in asserting that our decision amounts to a "sweeping new definition of relevance." We have found that the Respondent failed to timely rebut the relevance of the requested information. The Union's request for information regarding Federal contracts was made in the context of negotiations over Respondent's proposed drug-testing policy, a mandatory subject of bargaining. Accordingly, and consistent with well-established precedent, the requested information was relevant. The Respondent had a duty to provide the information or rebut the Union's showing of relevance. If the Respondent had replied to this request when it was made on August 9 (by telling the Union that Respondent had no Federal contracts), rather than delaying its reply for more than 3 months, the Union might have found the response adequate; and there might have been no valid basis for the 8(a)(5) allegation we now address. Finally, contrary to our colleague's assertion, we make no "sweeping" pronouncement. Our holding is limited to the facts of this case. The Union made a definitive response to a definitive proposal. That response was that the Union might agree to the proposal if the Respondent were covered by the Drug Free Workplace Act. There is nothing to show that this response was a ruse to pry information from the Respondent or was otherwise in bad faith. In these circumstances, we believe that information as to coverage became relevant to bargaining. On these facts, it is not a "sweeping new definition of relevance" to say that information that can enhance the prospect for agreement is relevant to the collective-bargaining process.

sence, to grant merit wage increases, and to subcontract unit work. The Respondent's proposed grievance and arbitration clause excluded from arbitral review the Respondent's use of the discretion provided under these proposed clauses. The grievance and arbitration clause also excluded from arbitration any grievance that questioned the Respondent's exercise of rights retained in the management right's clause. In contrast to the narrow grievance and arbitration clause, the Respondent's proposed no-strike clause would have broadly prevented the Union and the employees from engaging in "any strike (including unfair labor practice strikes), picketing, stoppage, sit-down, stand-in, slow down, curtailment or restriction of production or interference with work or similar actions in or about the [Respondent's] plant or premises" during the contract term. Thus, under the Respondent's proposals, employees and the Union would be left with no avenue to challenge the Respondent's decisions with regard to layoff, discharge, discipline, wage increases, leaves of absence, and subcontracting.

These proposals establish that the Respondent insisted on unilateral control of over virtually all significant terms and conditions of employment of unit employees during the life of the contract. Taken as a whole, these proposals required the Union to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining. *PSO*, supra, at 489; *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991) (employer's broad management-rights proposal that would make futile any grievance over a discharge and almost every other aspect of wages and working conditions was evidence of bad faith).[11] Indeed, if accepted, the Respondent's proposals would have left the Union and the employees with substantially fewer rights and protection than they would have had without any contract at all. Such proposals demonstrate bad faith.[12] *PSO*, supra, at 489.

The totality of the Respondent's conduct, considering all the facts viewed as an integrated whole, clearly demonstrates that it intended to frustrate negotiations and prevent the successful negotiation of a bargaining agreement. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining.

2. Remedial Matters

The General Counsel and the Union have requested that we award negotiation costs to the Union due to the egregiousness of the Respondent's bad faith demonstrated at the bargaining table. The Union also has requested an award of litigation costs.

In *Frontier Hotel & Casino*,[13] the Board set out the standard it would apply in determining whether negotiating costs should be awarded. There the Board stated that:

> [i]n cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table . . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

Id. at 859; see also *Teamsters Local 112*, 334 NLRB 1190, 1194 (2001), enfd. mem. No. 01-1513 (D.C. Cir. Feb. 14, 2003).

We do not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations. *Frontier Hotel & Casino*, 318 NLRB at 859. Nevertheless, we find that an extraordinary remedy is warranted under the circumstances of this case.

[11] In *Hydrotherm*, 302 NLRB at 994, the Board held that "a union might be willing to accept such comprehensive restrictions on the employees' statutory rights if the employer were offering something significant in return." We disavow any implication in the judge's decision that *Hydrotherm* establishes a per se rule that an employer must offer concessions in return for proposals that effect a waiver of statutory rights.

[12] In finding that the Respondent's proposals were further indicia of bad faith, Member Liebman would also rely on *Liquor Industry Bargaining Group*, 333 NLRB 1219 (2001), enfd. 50 Fed. Appx. 444 (D.C. Cir. 2002) (mem) (the Board "reasonably and consistently with its precedent, inferred. . . that 'the Group's final offer was extreme in nature, was made without any corresponding incentives to secure the Union's assent, and evidences that the Group was not negotiating in good faith with a view to trying to reach or complete agreement with the Union.'").

[13] 318 NLRB 857 (1995), enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

In our view, the Respondent's bad faith in negotiations, as described in section 1 above, establishes beyond doubt that the Respondent's unfair labor practices "infected the core of [the] bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" This is so because the Board's traditional remedy of an affirmative bargaining order, standing alone, will not make the Union whole for the financial losses it incurred in bargaining with the Respondent, financial losses which the Respondent directly caused by its strategy of bad-faith bargaining. Reimbursement of negotiation expenses is therefore warranted to make the Union whole for the costs of its negotiations with the Respondent and to restore the status quo ante.[14]

Finally, in awarding the Union its negotiation expenses, we note that neither the General Counsel nor the Union requested this remedy from the judge. However, they seek it before the Board and the Board is free to fashion a remedy designed so far as possible to restore the status quo ante. "It is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct." *Teamsters Local 122*, 334 NLRB at 1195 (quoting *Westpac Electric*, 321 NLRB 1322, 1322 (1996)). Accordingly, we shall order the Respondent to reimburse the Union its negotiation expenses[15].

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Regency Service Carts, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"Engaging in surface and bad-faith bargaining with the union which is the certified exclusive collective-bargaining representative of employees in an appropriate unit of:

> All full-time and regular part-time employees, including production and maintenance employees, polishing, pressing, plating, and shipping and receiving employees, employed by Regency Service Carts, Inc. at its Brooklyn facility, excluding carpenters, drivers, salespersons, office clerical employees, guards, and supervisors as defined in the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"Pay to the Charging Party Union its expenses incurred in collective-bargaining negotiations from October 16, 2000 until March 22, 2001, the date on which the last negotiating session was scheduled to occur."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues in all respects but one: I would not adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to timely respond to the Union's August 9, 2000 information request. As shown below, the requested information—the dollar amount of the Respondent's government contracts—was not presumptively relevant nor was its relevance demonstrated by the Union. Thus, the Respondent was under no obligation to provide it.

During negotiations, the Respondent proposed a "Drug Free Workplace" clause, which stated in part as follows:

> Any employee's [sic] who use, possess, distribute, manufacture, consume, or are under the influence of drugs and/or alcohol at work, on Company premises, or while in contact with somebody doing business with our Company, are subject to immediate termination.

[14] We note that the General Counsel confined his allegations to the 10(b) 6-month period preceding the filing of the charge. We therefore do not pass on a possible contention that, in a bad-faith bargaining case, the violation does not occur at a precise point in time. Indeed, it may not be readily apparent until long after negotiations have begun that bargaining has been in bad faith from the inception. In such cases, it may be possible to find the violation from the inception of bargaining, even if the charge is filed more than 6 months later, and, in such cases, it is possible to award penalties going back to the inception of bargaining.

The Board's Order awards to the Union its negotiating expenses incurred during the 6-month period preceding the filing of the charge. Since the complaint alleges that the Respondent engaged in bad-faith bargaining only during this period, Member Schaumber does not pass on whether, under other circumstances, it would be appropriate to award negotiation expenses for periods of time prior to the 10(b) period.

[15] On the other hand, we find that an award of litigation expenses is not warranted under the circumstances of this case. See, e.g., *Waterbury Hotel Management LLC*, 333 NLRB 482, 482 fn. 4 (2001).

Member Liebman would grant reimbursement of litigation expenses incurred by the Union and the General Counsel because of the Respondent's bad-faith surface bargaining conduct that gave rise to this litigation. *Teamsters Local 122*, 334 NLRB 1190, 1193–1194 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003); see also *Alwin Mfg. Co.*, 326 NLRB 646 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999).

The proposal also authorized random drug testing and required a physician's certification for employees working under the influence of a "prescription or over the counter medication." The Union did not agree to the proposal, but asserted that it might be receptive to portions of the proposal if the Respondent showed that it was covered by the Drug Free Workplace Act, a Federal law that requires covered Federal contractors to maintain a drug free workplace. Consistent with this position, the Union requested information that would demonstrate the statute's applicability to the Respondent, namely, the dollar amounts that the Respondent had (a) bid on and (b) been awarded in government contracts over the preceding 3 years.

The Respondent, through its negotiator, Chuck Ellman, promptly informed the Union that since its proposal was neither based on the Drug Free Workplace Act nor premised on its applicability to Respondent, the requested information would not be provided. Mr. Ellman said in pertinent part: "I didn't say our proposal was based on the [statute]," "we didn't propose it because [we are] obligated," "we just want it," and "our proposal doesn't assert the same things as the statute." While my colleagues describe the reasons Ellman offered as "less than clear and forthright," his response was sufficiently clear to communicate to the Union that the Respondent was not claiming coverage under the Drug Free Workplace Act as the reason for its drug testing proposal.[1]

The majority appears to find that the request was either (a) presumptively relevant or (b) relevant because it "could have enhanced the prospects for agreement." I respectfully disagree. Since information regarding the dollar amounts bid on and awarded in government contracts does not directly relate to the bargaining unit members' terms and conditions of employment such information is not presumptively relevant. Absent a demonstration of relevance by the Union, the Respondent was not obliged to produce the contract data. See, e.g., *SBC California*, 344 NLRB No. 11 (2005), and cases cited therein; see also *Rochester Acoustical Corp.*, 298 NLRB 558, 563 (1990), enfd. 932 F.2d 955 (2d Cir. 1991) ("[W]hen a union's request for information concerns…data on financial, sales, and other information, there is no presumption that the information is necessary and relevant to the union's representation of employees. Rather, the union is under the burden to establish the relevance of such information.") (quoting *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976)).

My colleagues find that the Union demonstrated relevance through Union representative Rosaci's testimony that "portions" of the Respondent's proposal were contained in the Drug Free Workplace Act and his "reasonabl[e] underst[anding]" that the Respondent's proposal was modeled thereon. The testimony is inaccurate as a matter of fact because the Respondent's proposal was more restrictive than the Federal statute and did not track the statute's provisions in any significant respect.[2] The majority does not dispute that the Respondent's proposal was not, in fact, modeled on the Federal statute, but nevertheless finds that Rosaci "reasonably understood" that it was. That finding is flawed for the same reason. Rosaci's unsubstantiated and factually inaccurate assertion that the proposal in some way tracked the statute does not form the basis for a "reasonabl[e]" understanding that it actually did. Instead, it demonstrates, at the very least, that the Union's request was based on Rosaci's misunderstanding of both fact and law. Most importantly, the Respondent never asserted that it was subject to the Drug Free Workplace Act and made clear to the Union that its drug testing proposal was wholly unrelated to the Act or any other Federal requirement. Consequently, any similarities in provisions perceived by Rosaci were insufficient to trigger a duty to disclose the Respondent's Federal contract data.[3]

I also reject my colleagues' finding that the Union demonstrated relevance when it claimed the information, if provided, "could have enhanced the prospects for agreement." The majority cites no precedent for this sweeping new definition of relevance, which would extend to any financial information of an employer, including data relating to profitability, pricing and executive salaries. Such information undoubtedly "could enhance the prospects of agreement" in the eyes of most Union negotiators, but the Board has never heretofore considered that a basis for compelled disclosure in collective bargaining.

Accordingly, I would dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to

[1] My colleagues accuse me of "ascrib[ing] both a level of clarity and a meaning to Ellman's statement that cannot reasonably be found in Ellman's actual words." As I have explained, Ellman's response was that the Respondent's proposal was not related to the Federal statute in such a way that the financial information requested by the Union became relevant. Considering the complete absence of any justification for the Union's contrary view, Ellman's response was a valid and legally sufficient rebuttal of the asserted relevance of the Union's information request.

[2] Rosaci never identified the "portions" of the Respondent's drug testing proposal he claimed to derive from the Act

[3] I do not disagree that the Respondent could have, and probably should have, simply told the Union that it did not meet the dollar threshold for coverage under the statute. However, that is a far cry from finding that the Respondent violated Federal law by failing to provide the Union with the dollar amounts of contracts bid on or awarded over a 3-year period.

timely respond to the Union's August 9, 2000 Federal contract data information request.

Dated, Washington, D.C. August 27, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail to timely furnish Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Union) with information it requests which is necessary to the performance of the Union's statutory duty as exclusive collective-bargaining representative of our employees.

WE WILL NOT refuse to bargain collectively with the Union by failing to meet at reasonable times and for reasonable periods of time and failing to confer in good faith with respect to wages, hours, and other terms and conditions of employment of our employees in the following certified appropriate bargaining unit:

All full-time and regular part-time employees, including production and maintenance employees, polishing, pressing, plating, and shipping and receiving employees, employed by Regency Service Carts, Inc. at its Brooklyn facility, excluding carpenters, drivers, salespersons, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, upon request, bargain in good faith with the Union, as the exclusive representative of our employees in the above-described certified bargaining unit, and embody any agreement reached in a written contract. The certification year shall extend 1 year from the date that such good-faith bargaining begins.

WE WILL pay to the Union its expenses incurred in collective-bargaining negotiations from October 4, 2000 until March 22, 2001, the date on which the last negotiating session was scheduled to occur.

REGENCY SERVICE CARTS, INC.

Amy S. Krieger, Esq., for the General Counsel.
Chuck Ellman (Labor Relations Associates), of Bedminister, New Jersey, for the Respondent.
Anthony J. Rosaci, of Woodstock, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Shopmen's Local No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, (herein called Local 455 or the Union) on April 2, 2001, the Director for Region 29, issued a Complaint and Notice of Hearing on June 28, 2001, alleging that Regency Service Carts, Inc., (herein called Respondent or Regency), violated Section 8(a)(1) and (5) of the Act, by delaying in providing relevant information to the Union, and by failing and refusing to bargain in good faith with the Union. The trial with respect to the allegations raised by said complaint was held before me on December 10, 11, 12, 13, 14, and 18, 2001. Briefs have been filed by General Counsel and Respondent, and have been carefully considered. Based upon the entire record, including, my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with its principal office and place of business at 337–361 Carroll Street, Brooklyn, New York, where it is engaged in the manufacture and non-retail sale of restaurant and hotel equipment. During the past twelve months, Respondent purchased and caused to be transported to its Brooklyn facility, fuel, goods, supplies and other materials valued in excess of $50,000, directly from entities located outside the State of New York. Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find that Local 455 has been and is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Prior Related Cases

29–RD–758 and 29–CA–17953–1, 29–CA–17953–2
29–CA–17953–4, 29–CA–18465

On January 28, 1994, a decertification petition was filed seeking to decertify, Production Allied Services of America and Canada International Union, Local No. 157 (herein called Local 157), which had been the collective representative of Respondent employees. Respondent and Local 157 last entered into a collective-bargaining agreement effective on its face from March 2, 1988 to March 1, 1991, which pursuant to an automatic renewal clause was renewed from year to year at least until January of 1995.

Local 455 began an organizing campaign in February of 1994, and intervened in the representation case. On February 17, 1994, a representation hearing was held at the Regional Office, attended by representatives of Local 455 and John and Connie Pezulich officials of Respondent.[1]

On March 1, 1994 an election was directed to be held amongst Respondent's employees, in a unit which excluded carpenters. The Excelsior list submitted by Respondent did not contain the name of Rocco Lacona, but did contain the name of Rafael Rodriguez. The election was conducted on April 22, 1994, and the results were undeterminative due to a number of challenged ballots, including the ballot of Lacona who was challenged by the Board because her name did not appear on the eligibility list, and by Local 455 alleging Lacona to be a carpenter. Respondent took the position that Lacona was eligible to vote as a helper employed for four years in the metal and wood department with production and maintenance duties which included assembling, carrying, moving, cleaning and polishing wood and metal products. On November 16, 1994 the Director issued a Supplemental Decision on Objections and Challenges, overruling objections that Respondent had filed, and directing the challenged ballots of thirteen employees, including Lacona's, be presented to an Administrative Law Judge and consolidated for hearing with unfair labor practice charges in Case Nos. 29–CA–17953–1, 2, 4, and 29–CA–18465.

The consolidated trial was held before Administrative Law Judge Michael Miller. On April 26, 1995, Judge Miller issued his decision and recommend Order, wherein he found that Respondent committed numerous violations, of Sections 8(a)(1) and (3) of the Act, exhibited substantial animus towards its employees efforts to decertify Local 157 and to replace 157 with Local 455.

In that regard, at the representation hearing on February 16, 1994, when informed that Local 455 intervened in the proceding, John Pezulich stated, "I don't care if they want to throw Local 157 out, but I'm not going to have another union come in." Pezulich added that he was not going to have the Union come in and tell him how to run his business.

On his return to the plant from the representation hearing, John Pezulich approached employee Mario Faryniarz at his work station. Pezulich informed Faryniarz that Unions were not needed at Regency, and asked Faryniarz for his opinion. Faryniarz replied that he supported the new union, because employees were dissatisfied with Local 157 and wanted insurance and better wages. Pezulich replied that he could give increases in wages and asked Faryniarz to poll other Polish and Russian workers as to their opinions about the Union. Faryniarz complied by questioning six employees and reporting the results to Pezulich.

Judge Miller concluded based on this conduct that Respondent had violated Section 8(a)(1) of the Act by coercively interrogating Faryniarz, promising him benefits, and enlisting him to poll other employees about their union sentiments.

On March 9, 1994, Connie and John Pezulich conducted a meeting of employees, during which they both spoke. John stated they "did not want . . . any union in his shop, that there would be no more favors, and he had always tried to be nice and you want to go out and get another union, and the doors might close and I might close the door. . . . There would be no one coming in and telling him how to run his business." An employee asked if there would be raises if they did not vote for the Union, and John Pezulich replied that it was "possible". Pezulich also said that he would not extend employees any more loans or do them other favors, and if the new union came in, he would be forced to shut the plant down or move out. He also expressed his desire at the idea that a different Union would replace Local 157.

Connie Pezulich asked employee Ellis Dargan, (the RD petitioner), what he would do if he were laid off, and informed the employees that Respondent could not afford the things employees were seeking, such as health insurance and better wages, and that if they voted for the Union, she would have to make further cuts.

Immediately after the meeting, Connie asked Faryniarz if he understood Respondent's difficult financial condition, and told him that they would close the firm and "people will go on the street." Another employee was told after the meeting by supervisor Toussaint, "don't do anything that you will regret.

The administrative law judge found that the meeting and surrounding events were "replete with clear violations of Section 8(a)(1) of the Act." They include threats of discharge, plant closure, denial of future benefits and favors, and threats that selection of the Union as their representative would be futile.[2]

Additionally, the Administrative Law Judge found that Respondent committed further violations of Section 8(a)(1) of the Act by the conduct of Toussaint of creating the impression that employees' union activities were under surveillance, and threatening employees with the loss of jobs if they supported Local 455, and by supervisor's Robert Pezulich's conduct of impliedly promising benefits to employees to withdraw support from Local 455.

Judge Miller also found that Respondent violated Section 8(a)(1) and (3) of the Act by cancelling the health insurance of

[1] John Pezulich is Respondent's general manager who is married to Connie Pezulich who is a vice president of Respondent and the daughter of the president and owner of Respondent Giacomo Abbate, Sr.

[2] In that regard, Judge Miller found that the statement by John Pezulich that there would be no one coming in and telling him how to run his business, conveys to employees that their support for the Union would be futile. *Our Way, Inc*., 268 NLRB 394, 414 (1983).

employee Dargan, and laying off and failing to recall six employees, including Faryniarz, because of their activities on behalf of Local 455.

Further the administrative law judge concluded that Respondent unlawfully discharged three other employees, because they engaged in a brief and spontaneous work stoppage in violation of Section 8(a)(1) and (3) of the Act.

With respect to the challenges, Judge Miller recommended that all the challenges be overruled and all the ballots opened. Several of the challenged ballots were discriminatees, and since the Judge found merit to the complaint as to their layoffs, their challenges were overruled. Five other challenges were overruled, because the Judge found them eligible voters as temporarily laid-off employees with the expectation of returning to work. The parties stipulated to the eligible of two employees, and their challenges were overruled. Finally, Judge Miller credited the essentially uncontradicted testimony of John Pezulich that employee Lacona was an assembler working with both metal and wood productions. Therefore, the Judge concluded that Lacona was in the overall production and maintenance unit.

On April 10, 1998, the Board issued a Decision and Order, *Regency Service Carts*, 325 NLRB 617 (1998), affirming Judge Miller's decision in all respects, with one exception. That exception, refers to the finding that Respondent violated the Act by discharging three employees for engaging in a brief spontaneous walkout. The Board observed that Respondent in its exceptions, asserted that the walkout was unprotected because it violated the no-strike clause in the collective-bargaining agreement. The Board concluded that since the record was unclear as to viability of the collective-bargaining agreement at the time of the walkout, or, even assuming the viability of the agreement, as to the applicability of the no-strike clause at that time, it severed and remanded that portion of the case to the Judge for taking additional evidence on those issues, and for issuance of a supplemental decision.[3]

On June 4, 1998 (after the challenged ballots were opened and a revised tally issued), the Board certified Local 455 as the collective-bargaining representative of Respondent's production and maintenance employees at its Carroll Street and Union Street facilities in Brooklyn, New York.

Respondent stipulated that the presently appropriate unit is geographically limited to only one facility, as follows:

> Including: All full-time and regular part-time employees, including production and maintenance employees, polishing pressing, plating, and shipping and receiving employees employed by Respondent at its facility located at 337-361 Carroll Street, Brooklyn, New York.
>
> Excluding: Carpenters, drivers, salespersons, clerical Employees, guards and supervisors as defined in the Act.

B. The Negotiations

On May 12, 1998, the Charging Party's attorney sent a letter to Respondent's labor representative, Chuck Ellman, requesting that in view of the fact that a revised tally of ballots showing that Local 455 had won the election had issued on April 27, 1998, and the expected certification that a meeting to begin collective-bargaining be set up immediately upon certification.

Ellman did not reply to this letter, nor did he contact the Union or its attorney upon the June 4th certification as the Union's attorney had requested. Consequently, on June 18, 1998, William Colavito, the president of Local 455 sent a letter to Respondent requesting that the Union be contacted promptly to set up a meeting, in view of the certification. Ellman sent a letter to Colavito, which was incorrectly dated July 23, 1998, but was mailed, sometime in late June. This letter indicated that he will be representing Respondent, and directed that he be contacted directly in order to set up "a mutually convenient time and mutual place to commence negotiations."

On June 30, 1998, Tony Rosaci, International District Representative of the Union and former official of Local 455 called Ellman and left a message for Ellman to contact him to schedule a meeting. A week later, July 6, 1998, Ellman returned Rosaci's call and told Rosaci that he was unable to schedule negotiation sessions because Respondent was on vacation and he did not know the availability of its officials. Rosaci pressed for some tentative dates, but Ellman replied that since the Employer was not around he couldn't do that, but suggested that the Union fax him some proposed dates.

Consequently, on July 6, 1998 Rosaci faxed Ellman a letter written by Local 455's attorney, Seth Kuperberg, in which the Union proposed nine separate dates in July for negotiation session, at either Respondent's premises or another agreed on location at any reasonable hour. The letter also requested the following information:

> List of names and addresses of bargaining unit members, their classifications, dates of hire, current wage rates, list of workers currently receiving health, pension life insurance or other benefits, plus a statement of what such benefits are.

Ellman replied by fax dated July 7 to Kupferberg. He reported that he believed that Respondent would be reopening within the next 2 weeks, and as soon as it reopened he would contact the Union about scheduling a meeting. He added that he would forward the information requested, since he understood the Union's desire to receive same prior to commencing negotiations.

By letter dated July 24, 1998 Kupferberg wrote Ellman protesting the failure of Respondent to contact the Union, despite having promised to do so, and even though Respondent's principals had returned from vacation the prior week. Kupferberg threatened to file a charge with the Board, if he does not hear from Ellman promptly.

Three days later, on July 27, 1998, Ellman faxed to Kupferberg three separate letters together, each letter dated differently, plus some accompanying documents. The first letter, dated

[3] The record does not disclose whether such a hearing ever took place, or the disposition of that aspect of the case. While the Administrative Law Judge's decision did not discuss the no-strike clause or the viability of the Local 157 contract, he did find that although the agreement renewed from year to year, no new agreement had been negotiated since the end of the 1991 contract. He further found that "it was the perception of at least some of the employees that they were receiving very little representation fro Local and few of the benefits under its contract."

July 20, 1998, states that Respondent had reopened, and is available to meet on July 29, 1998 at 2 p.m. at a mutually agreeable neutral site. It adds that the information requested would be submitted at or before the first session. The second letter, which is dated July 24, 1998, responded to the Union's request for information in its July 6, 1998 letter, including attachments, such as a brochure from U.S. Healthcare's HMO, and, statement that only two unit employees, which were named, are receiving such benefits. The list of employees provided included Rodriguez as a sprayer and Lacona as "woodshop". The letter also states that Ellman still awaits a response from the Union as to his July 20, correspondence. The third letter faxed to the Union on July 27, 1998, was dated July 27, and responds directly to Kupferberg's July 24 fax, accusing Respondent of bad faith and threatening to file unfair labor practice charges. Ellman asserted that Kupferberg's allegations lack of credence, because of his July 20 and July 24 letters, which he enclosed. Ellman added that he now had a calendar conflict on July 24, so he could not meet on that day, asked for other days for meetings, but added that Fridays were not possible and that he would be at an NLRB hearing the week of August 3.

Kupferberg responded by fax and mail on July 27, 1998, asserting that he never received the July 20 or July 24 letters that Ellman claimed that he had sent, and observed that it "is highly improbable if you in fact sent us a letter on July 20th." Kupferberg observed that Ellman never telephoned to confirm the July 24 date "as one might expect," if in fact, he was still awaiting a response from the Union as Ellman stated in his July 24 letter. Thus, Kupferberg stated that he doubted the sincerity of Ellman claim of having proposed a July 29 date and subsequent calendar conflict. Kupferberg proposed a meeting on July 29, 31 and on 7 different days between August 5 and August 14. He also reiterated the Union's previous request to meet at Respondent's premises, but indicated its agreement to meet at nuetral site, and proposed a Dunkin Donuts, located halfway between the Union's and Respondent's premises for that purpose.

Ellman responded by letter and fax, dated July 28, 1998. He referred to Kupferberg's correspondence of July 27 as "verbose and accusatory", accused the Union of not taking its legal obligations seriously, since Kupferberg had continued to propose negotiation dates, such as July 29, 31, the week of August 3, and Fridays, after being advised of Respondent's unavailability.

In any event, Ellman proposed a meeting for August 11, at 10:30 a.m. at the New York State Employment Relation Board (NYSERB), "Dunkin Donuts does not tend itself to the dignity of the occasion nor does it provide the necessary privacy." Ellman requested that Kupferberg respond promptly. Kupferberg immediately faxed a reply to Ellman on July 28, agreeing to meet on August 11, at the NYSFRB and asked Ellman to confirm promptly. Ellman did so by fax on July 28, 1998, confirming the meeting for August 11, 1998 at 10:30 a.m.

Thereafter, the parties met on 29 separate occasions, between August 11, 1998 and January 10, 2001. All of the negotiations took place at the NYSERB. Rosaci was the chief spokesperson for Respondent, while Ellman was the primary spokesperson for Respondent. Several employee committee members were generally present including Faryniarz, although the composition of the committee changed from time to time. Connie Pezulich attended the first 12 bargaining sessions, but neither she nor any other official or representative of Respondent, other than Ellman attended the remaining 17 meetings.

1. August 11, 1998 Meeting

At this meeting neither side presented any contract proposals. Rosaci asked for details concerning the cost of Respondent's medical plan with U. S. Health Care. Ellman replied that he didn't see the relevance since there were only two unit employees covered by the plan. Rosaci responded that he needed the cost so the Union could extrapolate it to the entire group. Ellman again insisted that the information is not relevant, but after Rosaci persisted, Ellman answered that he would consider it.

Rosaci also asked for a plan description. Ellman replied that the Union should call themselves and get the information Connie Pezulich provided the Union with an 800 phone number, a group number and the name of the plan. Rosaci asked if life insurance was still in effect. Ellman answered no.

Rosaci referred to Ellman's previous letter, which had indicated that employees are subject to a 6 month eligibility period for receipt of health benefits. Rosaci asked when did that requirement start.[4] Ellman replied, "history is not important", what's important is what is in place now. Rosaci answered that he thought that it did matter, if something was in effect for 3 months versus 20 years.

The parties then went over the list of employees that Respondent had provided. Rosaci asked about job duties and description. Ellman replied, "Ask the men". Rosaci responded that it's not what the men believe their discription is, it's what the company believes their description is. Rosaci gave an example of an employee listed as Press department, which is a location, not an occupation. Ellman replied that, the employee was a press operator. Questions were asked about specific employees, and Ellman replied as to what they do. Ellman indicated that Lacona was a helper in the woodshop making crates, and Edward Guerrero was a shipper-receiver.

Rosaci asked about information about wage increases from 1990 to present, since some employees claim to have received no raises since that time. Although Ellman initially asserted that the request was unreasonable, after Rosaci persisted, Ellman stated that Respondent would look into it.

Rosaci asked for the next meeting to be held at the shop, but Ellman said no it wasn't appropriate. Ellman added the NYSERB was more convenient for him. The Union requested starting the next meeting earlier than 10:30 a.m. or 4 p.m. or after, but Respondent would not agree. The parties agreed to meet on September 2, 1998, and also agreed on September 15 for the third session.

By letter dated August 11, Kupferberg confirmed information requests made by Rosaci at the August 11, 1998 meeting, including a revised list of employees, wage increases for employees since 1990, and the cost of Respondent's medical plan

[4] I note that the Local 157 contract contained no such 6-month eligibility requirement. The welfare provision of the contract provides for coverage after 60 days of employment.

with U.S. Healthcare. On August 18, 1990 Rosaci telephoned Ellman and informed Ellman that he was having trouble getting information from U.S. Healthcare, since he had been told by someone from U.S. Healthcare that the number he had been given by Connie was not a correct plan number, and further that no information could be provided to non-participant. Rosaci asked Ellman to assist in obtaining this information, and Ellman replied that the request should be made in writing.

Consequently, on August 19, 1998, Kupferberg wrote to Ellman, reiterated what Rosaci had informed Ellman, and asked Respondent to assist the Union by providing such information.

Ellman replied by letter of August 20, 1998 with several attachments. The attachments included the list of employees requested with classifications job description and wage rates, and information concerning costs and benefits of the health plan. The letter indicated that the prior communication that only two employees were receiving health benefits was in error, due to a typographical mistake, and that in fact, 4 employees, including Lacona were receiving such benefits. Additionally, the updated list submitted listed Lacona as "woodshop", and described his duties "assist in wood department only, all wood products and crates for shipping." Rodriquez was listed as a "sprayer", and Guerrero as a shipping department-shipping clerk.

2 September 2, 1998 Meeting

This meeting which began at 10:30 a.m. lasted less than an hour. After some discussion of discrepancies in the list of employees and pay rates previously submitted by Respondent, as well as the fact that any agreements reached must be ratified by Respondent's Board of Directors and the employees, the Union submitted a written contract proposal. It was over 30 pages, and contained all economic proposals except for wages. The bargaining unit in the Union's proposal is as follows:

BARGAINING UNIT

> This Agreement shall be applicable to all production and maintenance employees including plant clerical employees of the Company (hereinafter referred to as "employees") engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel, and other metal products, including plastic products, also all maintenance employees of the Company engaged in maintaining machinery and equipment and other maintenance work in or about the Company's shop or shops, and to work done by such production and maintenance employees. This Agreement is not intended and shall not be construed to extend to office clerical employees, superintendents, or to employees who are represented by any other union affiliated with AFL–CIO with whom the Company has signed a collective-bargaining agreement. This Agreement is not intended and shall not be construed to extend to erection, installation, or construction work, or to employees engaged in such work.

There was a discussion about the Union's bargaining committee, and that at the next meeting they would report to work, leave for the meeting and then return to work after the meeting. Ellman questioned whether this procedure might interrupt the flow of work, and said that Respondent would see if this was practical, and let the Union know closer to the session, scheduled for September 15. Rosaci asked if the meeting could be moved to 3:00 p.m., to avoid having to interrupt anyone from work. Pezulich said that she could not do that on September 15, but could meet at 3 p.m. in October. Rosaci responded that Union wished to keep the September 15 date at 10:30 p.m.

By letter dated September 1, 1998 Kupferberg wrote to Ellman, confirming the next meeting for September 15, and listing unit members who would leave work at 9:30 a.m. and return, time permitting after the meeting. On September 4, Kupferberg sent a letter requesting information on current status of two employees with work related injuries.

Ellman replied by letter of September 8, 1998, reiterating what he said at negotiations, that production needs of Respondent would determine whether the committee would be able to return to work after the September 15 meeting. On September 14 Ellman followed up by and advised that the employees would be permitted to return to work after the meeting, since there is sufficient work for than to perform. On September 11, Ellman provided the information requested in Kupferberg's September 4 letter related to work related inquires of two employees.

3. The September 15 Meeting

This meeting was scheduled to begin at 10:30 a.m. Pezulich arrived at 10:45 a.m., and then met with Ellman for 10 minutes. Thus the meeting did not begin until 10:55 a.m. Ellman asked the Union for to obtain various items from the Union's funds such as 5500 forms, trustee minutes, trustee agreements and listing of trustees. Ellman indicated that he wanted to see the condition of funds before making a decision on whether to agree to participate in any of them. Rosaci replied that he would try to get as much information as he could.

Ellman presented Respondent's contract proposals, which contained no economic proposals, such as wages, pension, medical insurance, severance pay, paid personal days or paid wash-up or break time. It did however contain a recognition clause, a union security clause, check-off clause, a grievance and arbitration clause, a no-strike clause, a seniority clause, leave of absence clauses dealing with vacations, holidays bereavement leave, bulletin board, a management rights clause, and a zipper clause. A number of these clauses were not fully filled in, such as violations and holidays. The term of the agreement was also left blank. Rosaci asked why some numbers in Respondent's proposes were left blank, and Ellman replied that they would bargain over the numbers.

Ellman asked what the Union proposed as to the effective date. Rosaci replied July 1, 1998. Ellman told the Union that Respondent didn't agree to retroactivity, but did not reject it either.

Ellman insisted that the unit description be as reflected in the Board certification, not as reflected in the Union's proposals. Rosaci did not respond directly to this assertion, but asked why addresses of Respondent were not in the contract, and Ellman replied that the certification was by location and skill. The parties discussed the Union's proposals prohibiting supervisors from performing unit work, successorship clauses, and extend-

ing the contract to the principals of the Company. Respondent rejected these proposals. Rosaci asked what if the company moves, and Ellman replied that the issue could be handled in negotiations. After some further discussion, Ellman told Rosaci that the meeting was going to end at 1 p.m., so that the employees could earn some money and because Pezulich had to leave. They discussed availability for the next meeting. Ellman replied, that he was busy for the next few weeks, because of the Jewish Holidays. Rosaci asked about September 28 and 29, which were not Jewish Holidays. Ellman replied that because of the short weeks, he was booked up for those days. Ellman indicated that he was available on October 6, 12, 13 and 15. Rosaci suggested locking in two days, October 6 and 12. Ellman agreed to lock in October 6 and 13. At the end of the session, Rosaci provided Ellman with the Union's wage and classification proposals.[5]

The next day, Ellman faxed a letter to the Union canceling the October 6 meeting, allegedly because the NYSERB was unable to accommodate Respondent's request for a room on that date. The fax confirmed the October 13 date, and requested that the Union supply it with minutes of all trust fund meetings from January 1993 to present, and various other items dealing with the Trust Funds and the Trust Funds Trustees.

Kupferberg responded by fax the same day, indicating that he had been informed by the NYSFRB, that it had no record of inquiry with regard to the October 6, meeting and that there is no problem reserving a room for both October 6 and October 13.

Ellman faxed his reply on September 17. Ellman insisted that he had spoken to an NYSFRB representative on the previous day, and conjectured that after that conversation, a cancellation occurred. Ellman also again requested the information previously made with regard to the Funds.

Kupferberg faxed his reply immediately, continuing to insist that he was informed by the NYSFRB that there was no problem confirming a room for October 6 and 13. He added that he will respond separately to Respondent's information request. Kupferberg did so by letter of September 24, 1998, advising that the Union had requested the Trustees of the Funds supply the information requested. He added that the Union had notified the Executive Director of the Employer Association, involved with the Union of Respondent's request, and suggested that Ellman contact the Director directly.

On October 6, 1998 at 10:47 a.m., Ellman faxed to the Union a letter canceling the meeting scheduled for 1:30 p.m., that day, because of a death in his family that morning. The letter confirmed the October 13, 1998 date.

4. The October 13, 1998 Meeting

Ellman began this meeting by protesting that he had not received the information that he had requested, from Local 455's Funds. Rosaci replied that the Union sent a letter to the Funds requesting the information, but that the Funds had a new manager, which might delay the gathering of information. Rosaci asked if Ellman had any economic proposals to make. Ellman replied that he needed the Trust documents in order to make an economic proposal. He added that he needed to know what the Trustees intended to do over the next few years, condition of the Funds, and what will occur, and whether the Trustees could unilaterally increase contributions. Rosaci responded that the Trust Agreement could not override the collective-bargaining agreement. Rosaci added that Ellman could make an economic proposal on the cost of the fund and separate the condition. Ellman insisted that they were inter-rated, and would not make a proposal contingent on the Funds. Rosaci then asked aside from Fund issues, whether Ellman had proposals to make on other economic issues, such as wages, vacation, sick pay, holidays. Ellman answered that he wanted to make an economic proposal when he could see the whole picture.

Rosaci replied that he disagreed with Ellman and felt that the parties could make progress on economic issues without waiting for the Fund information, but since he had no choice, suggested discussing Respondent's proposals.

Rosaci began by asking about the Union's hiring hall proposal. Ellman replied that in his view it was inappropriate, and he set forth his reasons for this position. The discussion then turned to workweek, and Ellman stated than Monday through Friday is not a set workweek, and he did not want a set workweek. Rosaci modified the Union's proposal from a 7-1/2-hour day to 8 hours, exclusive of paid lunch, and the Union's definition of workweek would be 5 consecutive days, Monday to Friday. Ellman answered that Respondent would agree to 5 consecutive days, but not Monday through Friday, since it wanted flexibility to schedule Tuesday to Saturday or Wednesday through Sunday. Rosaci asked if Respondent ever had those arrangements? Ellman replied that he did not know if it ever happened before, but he did not want to restrict the company's ability to schedule, and objected to "broad-sweeping restrictions." Rosaci answered that Monday to Friday is not a "broad sweeping restriction", and that it was normal for a manufacturing company to have stability in scheduling which was important for family life. After a caucus, Ellman informed the Union that Respondent does not intend to change steady workweeks, or consecutive workweeks, except for emergencies, but will give the employees 2 weeks notice before changing workweeks.

The parties discussed the Union's proposal on two or three shifts. Ellman objected and did not want lesser hours for these shifts. Rosaci asked if Respondent ever had a second or third shift. Ellman answered no, but it has and is being considered. Rosaci asked about economic differential on shift work, and Ellman replied that he did not accept the philosophy of premium wages. However, Ellman added that he's willing to discuss premium rates if Respondent had a second or third shift.

The parties then discussed overtime, Respondent's insistence that it be mandatory, whether overtime is paid after a holiday, how employees were selected for overtime, how much advance notice would be required, and whether employees could choose to have time off instead of overtime. Although there was much discussion on the subject, no agreements were reached concerning overtime at this meeting.

[5] This proposal included wage increases of 7 percent , 6 percent, and 6 percent over a 3 year period, and a lump-sum payment to employees (amount to be discussed), plus minimum rates for various classifications ranging from $9 to $15 per hour, with increases in these rates in each year of the contract.

The parties then discussed the scheduling of the next meeting. They agreed to October 28, 1998 and November 17, 1998 at l:30 p.m.

5. The October 28, 1998 Meeting

Ellman began this meeting by again asserting that he had not received the fund documents. Rosaci indicated that the Union was withdrawing its proposal that Respondent pay into its Severance Fund, but instead requested that severance benefits are to be paid to employees directly, if it goes out of business. Ellman asked again about the Funds Minutes. Rosaci responded that the Union did not believe that he was entitled to that information, since the needed information was in the Trust Agreement. Ellman replied that he needed the Minutes, since it discussed internal problems, such as claims lawsuits or contemplated increases, which do not show up in the other documents. Rosaci reiterated that the collective-bargaining agreement would set the rates. Ellman continued to insist that he needed the minutes and threatened to file charges with the Board if he did not receive them.

Rosaci asked about economic proposals from Respondent, and Ellman continued to insist that he needed the trust information. Rosaci continued to assert that Ellman could still make partial proposals on sick leave, holidays etc, without that information, reminding Ellman that the Union had made its proposals on economics.

Ellman replied, "you want a contract, we don't." He added that economics is like a pie. Rosaci answered that Respondent should give the Union a whole number and the Union would decide where to put it or would negotiate on that. Ellman said he would not do that, Respondent hadn't refused to discuss anything with the Union, and that Union wanted to start with page one and go through and that's what was being done. Rosaci disagreed, asserting that it wasn't his choice to go through fro page one, but that in the absence of economic proposals from Respondent, they were forced to go through the language. Rosaci opined that if economic were worked out, language would fall into place a little bit easier.

The parties then discussed the issue of Respondent's new requirement that employees notify Respondent in writing if they want to use unused vacation. After some discussion of why Respondent instituted this requirement, Ellman stated that Respondent would agree to the Union's suggestion that Respondent provide a form for employees to fill out on this subject.

Ellman asked about the Union's proposal that moneys be contributed to an annuities Fund. Rosaci replied that this was a mistake, and the proposal should have been deleted before being presented to Respondent.

After a discussion of the Union's sick and disability Fund, the subject turned to overtime, and workweek. Ellman reiterated that he did accept a Monday through Friday workweek, but made a proposal that when overtime work was to be performed, Respondent would attempt to notify employees of overtime no later than the end of the lunch break. Ellman explained that Respondent had a shop in Nevada, with a three-hour time difference, so it might not get a call until later in the day. The parties then discussed the calculation of overtime pay and holiday pay. Respondent agreed to continue its current practice that Saturday or Sunday Holidays would be celebrated on Mondays.

The discussion turned to the Union's proposal that in order to be eligible for holiday pay, the employee must have worked during the scheduled week, unless he was on vacation or a confirmed illness or injury. Rosaci explained what was meant by a confirmed illness. The parties after extensive discussion agreed that a confirmed illness is defined as an employee who is seeing a doctor, is on disability or on compensation, but not those who were out on disability or illness.

Respondent modified its proposal concerning payment for holidays that fell during their vacation. Its original proposal stated that employees will receive pay or extended vacation at the sole discretion of the Employers. Respondent modified it to provide that the employee will receive pay, unless the employer and employee agree to additional time off. Ellman asked what Rosaci's objection was to Section D of its proposal, which provided that any of the holidays agreed upon could be changed to another paid day upon the majority vote of employees and written consent of Respondent. Rosaci replied that this clause bypassed the Union. Ellman answered that it was not Respondent's intention, and said that Rosaci should furnish proposed language and he would consider it.

Rosaci indicated that as far as the Union is considered, sick leave or personal days were equal, and a person could take either interchangably. Ellman replied he personally felt the same way, as long as employees give notice to Respondent.

The parties also discussed the Agreement Clause in the Union's proposals, which provided that if Respondent sells, merged or moved its plant outside the metropolitan area, the successor or merged company or the Company itself, if it merely moved, would continue to be bound by the terms of the contract. Ellman asserted that these clauses are illegal. Rosaci replied, that the Union's attorney believes the clauses were legal, and Ellman suggested that the Union review *Burns* successorship cases. Rosaci added that the Union is not going to insist on any illegal language in the contract, that it wasn't "cementing in," and it would like to move forward.

Towards the close of the meeting, Rosaci again emphasized that Respondent should put forward economic proposals. Ellman made no reply to that request, but asserted that is why he doesn't recommend employees going into a Fund because not only do they agree to the contract but also agree to the Fund documents and rules. Ellman added that if Union were smart they would ask for money and go out and get their own policies. Rosaci disagreed with Ellman's assertion in this regard, and after a discussion of the pro's and con's, of using Funds, Rosaci commented that if Ellman did not want any Funds at all it should say that and "not go through this whole charade of asking for information."

By letter dated October 23, 1998, Kupferberg wrote to Ellman, advising him that the Fund was sending to Ellman as he requested, 5500 Forms, list of Trustees, copies of the Trust Agreements and Amendments. However, Kupferberg stated that the Union does not believe that there is any basis for Ellman's request for minutes of Fund meetings.

Ellman responded by letter of October 26, 1998, renewed his request for the Fund minutes, stating that this information

would include discussion regarding Fund problems as well as the future direction of the Funds, and is relevant to Respondent's decision making process. It adds that failure to provide such information would result in the filing of an NLRB charge.

The parties then exchanged and agreed upon a draft from for employees to use in requesting accrued time off during the year-end shutdown.

Between October 30, 1998 and November 13, 1998, Ellman and Kupferberg exchanged a series of letters, dealing primarily with Respondent's information requests from the Funds. The primary focus of the letters was Respondent's continued insistence on receiving the minutes and the Union's refusal to supply them or make any attempt to persuade the Fund to supply the minutes. In one of the letters, Respondent requested some additional information, based on the review of the documents submitted to it. Kupferberg responded to some of these questions, but not to others, asserting that they were not relevant to the Union's proposals.[6] In several of Kupferberg's letters, he asserts that he expects Respondent to make full economic proposal at next November 17, 1998 bargaining session. In his letter of November 13, 1998, Kupferberg requested a number of items of information all dealing with health and safety issues, including a request for an inspection of the premises by a health and safety expert.

On November 16, 1998, Respondent filed a charge with the Board in Case No. 29–CB–10776, alleging that the Union has violated Section 8(b)(3) of the Act, by refusing to furnish relevant information to Respondent, and by demanding the inclusion of invalid, unlawful or nonmandatory proposals.

6. The November 17, 1998 Meeting

This meeting began once more with a discussion of Respondent's demands for information from the Funds. Rosaci answered some of Ellman's questions as to who were the Trustees and why certain items were missing. Ellman again asked about the minutes, and Rosaci reiterated the Union's position that Respondent was not entitled to that information, and that it had enough information to make a judgment and a proposal. Ellman replied that it couldn't make a judgment, and it would wait for the Labor Board. Ellman asked about some other items in his requests, such as explanations of administrative expenses, legal expenses and discrepancies reported involving the Funds. Rosaci replied that the Union was not obligated to provide anything more, except that he would look into where the amendments were that had not yet been provided.

Rosaci asked about the Union's requests to have a safety expert inspect the plant, and its information request with regard to safety. Ellman replied that the Respondent would provide what he thinks the Union is entitled to, and after some discussion, rejected the Union's demand for an inspection. However, he added that he would reconsider this position, if the Union's attorney could cite some NLRB decisions.

After some discussion concerning the supplying of a refrigerator for food, and notification for overtime, Rosaci asked if Respondent would be making economic proposals that day, Ellman answered yes, on some issues, but it would not be proposing a complete package.

Ellman then asserted that the Union's union security proposal is illegal. Rosaci disagreed, and insisted, as he had told Ellman before that the Union's language was lawful.

Ellman then made a proposal to provide a full day of holiday pay on the day before Christmas and the day before New Years. This represented an improvement over current practice, wherein Respondent paid only, a half a days pay on these days. Ellman added that the other holidays presently enjoyed would be the same, along with personal days.

The discussion then turned to a discussion of the Union's proposal on reporting pay.[7] Ellman, in response to a question from Rosaci, said that Respondent had no reporting pay practice. Rosaci asked if employees receive pay if they are directed to report for work, but do not work a full day. Ellman responded that this never happened. Rosaci replied, that the Local 157 contract provided for half a days pay. Ellman answered that Local 157 hasn't been there for years, and there is no such practice.

Rosaci asked about the Union's proposal 9(c) dealing with pay if employees go to the doctor from work and return. Ellman answered that he had a proposal elsewhere. Pezulich informed Rosaci, in response to his inquiry, that if an employee is sent to the doctor and returns to work he is paid for the time spent at the doctor seeking treatment.

Rosaci again asked about a wage proposal from Respondent. Ellman indicated that he wanted to go sequentially through the Union's proposals. Rosaci answered that discussing sequentially is fine, but the Union had presented a complete proposal to Respondent, and wanted a complete proposal, including wages from Respondent. Ellman replied that he was not ready to give a wage proposal at that time.

The parties then engaged in an extensive discussion of the issue of the grievance procedure dealing with issues in both the proposals of the Union and Respondent, such as definition of a grievance, number of steps in the procedure, whether there should be time limits, whether the grievance must be in writing, the role of the shop steward, how the arbitrator would be selected, and limitations on the arbitrator's role. No agreement were reached on any issues, but Respondent did withdraw its demand for a step 1 grievance,[8] but insisted that it needed time limits on the grievance, but would agree to lengthening the steps.

After concluding their discussion of the grievance procedure, the parties discussed the date for the next meeting. Rosaci asked for December 3, 9, 10 or 11, but Pezulich said that she would be out of town on these days. Rosaci proposed December 17, 1998, and this date was agreed upon.

[6] Some of these items included information and explanations concerning administrative expenses, legal fees and salaries with regard to the Funds.

[7] This proposal provides for reporting pay in various situations, such as when an employee is sent home, when an employee is sent by the Union to the shop and there is no work, and where an employee is injured on the job and is sent to doctor and returns to work.

[8] This step provides that a grievance must first be presented orally with the supervisor by the employee or the steward.

On December 10, 1998 Kupferberg, by letter repeated the Union's demand for inspection of the workplace by a health and safety expert. He explained that is not a demand for access on a on-going basis, but one to obtain information needed by the Union to formulate health and safety proposals. The letter also cited NLRB precedent, which supports the Union's demand in this regard.

7. The December 17, 1998 Meeting

Ellman began this meeting by giving Rosaci a letter from a contracting company indicating that the water in Respondent's sinks was clean and safe, and an attached OSHA log. Rosaci complained that the sink smells, since employees wash their hands after polishing, and suggested that Respondent install a water fountain so employees could drink. Ellman accused the employees of being slobs, and of smoking in the factory. He suggested that since the Union is concerned with health and safety, it should get the word out that men should not smoke or Respondent would resort to discipline.

After a discussion of refrigerators and safety equipment, Rosaci asked about the Union's request for a safety inspection. Ellman replied that he hadn't gotten a chance to read the union attorney's letter, which cited Board precedent, but he would read it and if it sounds right, let the Union know if he would grant inspection.

Rosaci asked about the Union's information request on safety and health. Ellman replied that he had given the Union the OSHA logs, and most of the rest of what Rosaci asked for fell under confidential employee medical records. Further Ellman questioned the relevancy of disability information, and stated that he would need releases signed by employees before they turned over medical information. Rosaci replied that the Union's attorney would respond in writing to Ellman's concerns, but added that disability claims may contain actual work related injuries or illnesses that get claimed as disability rather than as compensation. Rosaci indicated that he needed to understand that was happening in the shop, but he was not interested in names, and suggested that names could be deleted. Ellman replied that it was a small unit and by identifying a claim, by date of hire or date of birth or date of injury, it was too easy to figure out the name of the employee involved in the claim. Rosaci asked about material safety data sheets that the Union had requested, and Ellman replied that they were working on it. Rosaci asked about a hazard communications program, and after a discussion about it, Ellman stated that Respondent did not have a written program in that regard.

Ellman took a 5-minute break to make a phone call. When he returned, Rosaci reminded Ellman of how long the employees had been without a wage increase, and suggested that in recognition of this fact and the employees loyalty to the company, that it provide a $500.00 Christmas bonus. Respondent then caucused, and informed the Union that it would consider the Union's request.

Ellman asked if the Union had any counter proposals to make on Respondent's time limits proposal in the grievance procedure. Rosaci replied that he would do so at another meeting, but asked that Respondent present a full contract proposal before the Union starts making counter proposals. Rosaci asked about an economic package. Once again Ellman replied that he needed information on the Funds before Respondent could determine its economic package. Similarly, Rosaci reiterated the Union's position that Respondent did not need that information to formulate its proposals.

The parties then discussed the grievance and arbitration provision in the parties proposals, as well as the proposed no strike clause and its exceptions, as well as the Union proposal that employees need not cross picket lines.

The discussion then turned to plant visitation. Ellman indicated that Respondent did not object to the Union's right to visit the plant, but wanted three days notice as per its proposal. Rosaci would not agree to that, and Ellman indicated that Respondent did not want indiscriminate visits by the Union. However, it would consider alternate notice. After some discussion, the parties agreed on January 7, 1999 for the next meeting.

By letter dated December 18, 1998, Ellman cancelled the January 4, 1999 meeting, because the date was in the middle of the first week after the winter closing and would cause too much disruption after reopening. Ellman suggested January 12 or 14, 1999 for another meeting.

On December 17, 1998 Kupferberg wrote to Ellman, confirming a meeting for January 12, 1999, explained that the Union continued to await Respondent's recognition of the Union's right to have the workplace inspected, and explained the relevance of the disability information previously requested.

By letter dated December 29, 1998, Ellman sent Rosaci various health and safety data sheets, acknowledged the Union's right to request a workplace inspection, but asked some questions about the identity and qualifications of the export. Ellman reiterated his concern about the relevance of disability information, and repeated his prior request for written releases from employees.

By letter of January 11, 1999, Ellman wrote to Rosaci, canceling the January 12 meeting because of an unanticipated medical problem, and promising to contact Rosaci the next week to reschedule.

By letter dated January 19,1999 Rosaci provided Ellman with safety inspector Olmsted's resume, and proposed dates in February for the inspection.

Kupferberg wrote to Ellman, dated January 20, 1999, noting that the Union had not heard from Ellman with regard to rescheduling negotiations, and suggested four days at the end of January 1999. By letter dated the same day, Ellman agreed to meet again on February 3, 1999, which date subsequently was confirmed. By letter dated January 28, 1999, Ellman apologized to the Union for not getting back to the Union sooner, stating that it was his first day back to work, and indicated that only one unit employee had filed a disability claim in the past 5 years.

On February 1, 1999, Ellman cancelled the February 3, 1999 meeting, and agreed to meet on February 8, 1999. By letter of February 1, 1999, Kupferberg confirmed this date, and noted that the disability information supplied was inadequate since it failed to state employees job title, length of disability, and medical condition involved. Further, it noted Respondent's

failure to respond to the Union's suggested dates for the inspection.

By letter of February 5, 1999, Ellman responded that the disability claim employee was a polisher who never returned to employment, indicated that details about the worker's compensation could be found in the OSHA log previously provided to the Union, and reminded Kupferberg that Respondent still had not received amendments to the trust fund documents.

8. The February 8, 1999 Meeting

At this meeting, Ellman agreed to the inspection, for January 24, 1999, but asserted that Respondent had a number of issues, which he listed. These included that there be no discussion between employees and the inspector, no disruption of work, the inspector had to wear normal clothing with no identifying marks or I.D., management would have to be with him, Respondent would receive copies of any report, no photos or tape recording would be made, and Pezulich wanted to be there. Rosaci made no response at that time to these conditions.

The discussion then turned to compensation, and Ellman indicated that there were only three workers compensation claims. Rosaci asked for more specific information, such as the extent and nature of the injury. Ellman replied that this was confidential information and would not be supplied without a release. Rosaci asked if the insurance company had done any work place studies or whether the company had performed any workplace inspections. Ellman answered that he would find out and let the Union know.

Ellman asked the Union about Fund documents that he had not yet been received. Rosaci replied that he had asked Kupferberg to call the Fund office and track it down, but added that the documents were immaterial, because Ellman did not need them to make an economic offer. Ellman replied by stating in effect that there is no precedent as to when an economic offer must be made, but it will be taken care of. Rosaci responded that the men hadn't received a raise in six years, that office people and Connie received raises, and the company is profitable, but there is still no economic offer from Respondent.

Ellman then asked for Rosaci's counter proposal to his proposed on 3-day visitation notice. Ellman asserted that Rosaci promised to do so at this meeting, but Rosaci disputed that claim, and said that he would counter, but he didn't want to get hung up on such issues, "and not get to the important issues." Rosaci complained about Ellman's position that he will "only make an economic proposal when you get to it."

The parties then discussed seniority issues, and then Ellman's proposal for a 90-day probationary period. Rosaci protested that if in the past Respondent had a 30-day probationary period, and asked why it needed to increase it to 90. Ellman replied that Respondent needed 90-days to evaluate employees and measure the quality and quantity of their work.

After a caucus, Ellman spoke to Rosaci individually outside the presence of anyone else. Ellman told Rosaci that he wasn't feeling well and would like to break early. Ellman informed Rosaci that he intended to present an economic proposal, and that it was "minimal for the first proposal-its as low as yours is high." Rosaci answered that he would be willing to break early, but he wanted an early date for another meeting. Ellman agreed to reschedule.

They went back into the room, and Ellman made Respondent's economic proposal. He rejected the Union's pension proposal, and made a proposal that Respondent would pay 15 percent of the cost of health coverage in Respondent's U.S. Health Care policy, and employees would pay the remaining 85 percent. Rosaci asked if payment would be made for all three levels of coverage, single, husband and wife, or family. Ellman replied yes, 15 percent of whatever plan type.

As for wages, Respondent proposed no minimum starting rates, no rates based on classification, and a 25-cent-per-hour increase for each employee each year for 3 consecutive years. The meeting ended with an agreement to meet on February 22, 1999.

By letter of February 9, 1999, Kupferberg confirmed the February 22 meeting, and reiterated that Respondent had been requested to provide information, such as workplace injuries and illnesses, compensation claims, workplace inspections and consultations. The letter also confirmed the inspection date of February 24, 1999.

Ellman responded by letter to Rosaci dated February 11, 1999, wherein he indicated that one more unit employee had filed a workers-compensation claim in 1999, none were filed between 1997–1999, and reminded Rosaci about the necessity to obtain releases. The letter also repeated the conditions for the inspection that he had detailed at a previous meeting.

By letter dated February 16, Ellman added three more names to the list of employees injured on job, and added that no insurance carrier had conducted a study/analysis of workplace injuries or illnesses. He also stated that he would be preparing a General Release Waiver Form for the inspector to sign before commencing the inspection, affirming that the inspector would not sue for injury or claims arising from the visit.

9. The February 22, 1999 Meeting

This meeting began with a discussion of the release that Ellman wanted the inspector to sign. Ellman then turned over to Rosaci a NYS Workmen's Compensation Board Decision, directing a payment of $400.00 to a doctor, regarding employee Elick Dargan.

Ellman modified his seniority proposal to be only by classification. Ellman also stated that if the parties reached an agreement on the probationary period, he would extend seniority back to date of hire. Rosaci protested that Ellman had previously agreed to that, but Ellman disputed Rosaci's assertion in that regard.

The parties then discussed several issues including extensions of the probationary period, temporary assignments, and preserving seniority on layoffs. As to the latter issue, Rosaci asked if Respondent's policy changed, since the Local 157 contract provided for 1 year of seniority protection in the event of layoff. Ellman responded that there was no change, since the Local 157 contract had not been in effect for 5 years.

Other issues discussed included discharge for falsification of job applicators, layoff notices, and selection for layoffs. No agreements were reached on any of these matters.

Respondent also rejected the Union's proposal that Respondent post a "date of hire" list, as well as the Union's proposal for minimum staffing. Once more Rosaci asked whether anything changed since Local 157 was there, because they had minimum staffing in their contract. Ellman did not respond to this inquiry.

After discussing leaves of absences and pay before layoff, the topic turned to Respondent's bereavement pay proposal. Ellman clarified that the immediate family in its proposal is defined as either/or an employee's parent, spouse, and child. During this meeting Ellman answered two calls on his cell phone, which lasted 7 to 8 minutes.

Ellman also proposed continuing the current levels of vacation pay entitlement, ranging from 1 to 3weeks, depending on years of service.

The parties agreed on March 11, 1999 for the next meeting.

By letter dated February 23, 1999, Ellman wrote to Kupferberg, confirming the agreement reached on the inspection of the premises by the Inspector and the Union's hold harmless agreement.

By letter of March 10, 1999, Kupferberg wrote to Ellman, indicating that the only amendments to Welfare and Pension Agreements were already supplied to Ellman, but were enclosed again. Kupferberg also reminded Ellman that Pezulich had agreed at the last meeting to fax the Union an up-to-date OSHA log, which had not been received.

10. The March 11, 1999 Meeting

Pezulich apologized for not sending the OSHA log, and indicated that she would send it. Rosaci requested a copy of a warning letter issued to Faryniarz, one of the committee members. Ellman refused to provide it. Rosaci stated that in the past warning letters were not given for one day's absence without calling in, which was the case with Fairymiarz. Ellman replied that Respondent has given notices in the past when they think it is appropriate, but they were not willing to sit and discuss disclipline imposed. He added that Respondent would negotiate it as part of the grievance and arbitration procedures. Rosaci replied that the Union would of course negotiate grievance and arbitration procedures, but that Respondent has an obligation to discuss with those types of things with the Union as bargaining agent.

After a brief discussion of Respondent's NLRB charge, Rosaci modified the Union's medical proposal, and instead of requiring payments into the Union's Fund, proposed that Respondent pay into a different U.S. Healthcare plan and a $10,000 Life Insurance policy, with 6 months additional coverage for laid-off employees, plus pre 65 retirement coverage for husband and wife.

The discussion then turned to the subject of bulletin boards. Pezulich informed Rosaci that notices were currently posted on a plywood bulletin board near the timeclock. Ellman stated that Respondent's proposal is that only issues pertaining to the collective-bargaining agreement can be posted there. Rosaci asked about picnics and social events. Ellman replied no, it wouldn't be allowed. Rosaci answered that bulletin boards are "a good gauge of where the company is going. If you can't agree on a simple matter like that, you're sending me a message."

After a discussion of who pays for the medical exam required by Respondent the subject turned to safety equipment. Ellman agreed to provide a list of the safety equipment used and some form of protected equipment for inclement weather. With respect to lockers, Ellman stated that lockers, are provided by Respondent, but Respondent didn't want to be responsible for what is left inside, and the lockers would be subject to inspection by Respondent. Rosaci wasn't happy about the inspection requirement, but in an effort to put something to bed, the Union agreed.

Respondent agreed to provide clean and sanitary toilet facilities and soap and water, but rejected the Union's proposal for a water cooler.

The discussion then turned to the Union's proposal to restrict subcontracting. After some discussion of the proposal and its meaning, Ellman stated that Respondent rejected the Union's proposal, that it had been subcontracting over the years, and that it wanted no prohibition to purchasing fully finished products. Rosaci asked why Respondent subcontracted, was it faster, cheaper? Ellman replied yes, those reasons and others. It's done more efficiently. Rosaci asked what he meant by efficiently. Ellman answered, "Next time I'll bring you a dictionary." Rosaci answered that Ellman didn't have to be a wise guy, and explained that efficiency can be related to labor, machinery or even management. Ellman responded, maybe more reasons." Rosaci asked what they were. Ellman answered, "I don't know use your example. We want unrestricted ability."

Rosaci than inquired how much Respondent subcontracted. He asked for a percentage of the work subcontracted, that type of work and the reasons. Ellman replied that he would consider the request. Rosaci responded that he would put the request in writing before the next meeting, so there is no misunderstanding what he was asking for.

The parties then discussed the Union's Election and Field Work Proposal. Ellman indicated that the Union was trying to remove people fro the bargaining unit.[9] Rosaci asked if Ellman asserts that employees doing this work are under the contract. Ellman replied, yes, and the Union was trying to limit the NLRB certification.

Rosaci asked how much work is done outside the plant? Ellman responded, "I don't know, ask your people." Rosaci explained that employees do not always know if someone not in the plant is out sick or assigned to another job. Moreover, Respondent makes the assignments and it was its obligation to provide the information, not the committee. Ellman asked Rosaci why the Union needed the information. Rosaci replied that depending on the amount of outside work, he'd consider a different pay rate for outside work. Ellman replied that he would consider the Union's request.

The topic of paydays was next on the agenda. Ellman, after a caucus agreed to part of the Union's proposal, that employees would be paid on a set day each week, but rejected the remainder of the proposal which provided that employees be reimbursed for the fees for cashing their checks, and its request that

[9] The proposal reflects that the contract shall not apply to eriction, Field Fabrication Construction work, and Respondent will not require employees in the unit to perform such work.

upon layoff employees be paid off immediately. Ellman stated that employees would be paid according to law, and also rejected the Union's proposal for a timeclock.

Ellman stated that Respondent had a timeclock, but rejected a requirement that it would be obligated to use one. He added that Respondent might go to a sign in sheet or fingerprint I.D. Rosaci began to discuss the Union's objectives, and that a timeclock is an objective way to record time and would minimize disputes. Ellman interrupted Rosaci before he was finished, and stated, "I don't care what the objective of the Union is". Rosaci rejoined that, "in order to have negotiations, you need discussion. In order to have a discussion you need to know my viewpoints."

After some more discussion of paychecks and payroll services, the parties discussed the savings clause proposals in the two agreements, and Ellman indicated that conceptually there is no difference between the two; the parties just need to fine tune the wording.

The parties agreed on March 31, 1999 for the next meeting to start at 12:30 p.m., since Ellman had to leave early because that date was Passover.

The following day, Marcy 12, 1999, Kupferberg requested by letter, that Ellman supply a list of all safety equipment provided to employees, which they were expected to use, as well as specific information with regard to off-premises repair and subcontracted work.

By letter dated March 16, 1999, Ellman faxed Rosaci the requested OSHA log.

On March 16 and 22, 1999 Ellman wrote to William Melleu, Welfare Fund Manager requesting various items of information from the Funds.

On March 25, 1999, Ellman wrote to Rosaci, amending his prior request for minutes of the Funds Trustees, to only those reflecting discussion of potential increased contribution rates, potential changes in benefit levels, and conditions which might trigger ERISA withdrawal liability, pending claims or lawsuits, and added that Respondent would accept redacted copies after review by a third party such as the NLRB.

By letter dated March 26, 1999, Kupferberg wrote Ellman that the NLRB has asked him to confirm in writing that the Union did not insist on contractual language defining the unit differently from the Board certification language and would sign a contract using such language. Additionally, Kupferberg advised that since the Union had withdrawn its proposal that Respondent contribute to the Union Welfare Fund, information regarding that Fund was not relevant and would not be supplied. He also gave a response to Ellman's prior requests for other Fund documents. Some were supplied, others did not exist, and some information Kupferberg deemed confidential or irrelevant. He specifically noted that the Fund minutes were not presumptively relevant and no reason for them to be deemed relevant, there was no basis to produce then. Finally, Kupferberg noted that much of the requested information was within the preview of the Fund Trustees and not the Union, and the fact while Union officers may be Fund Trustees; their roles are separate and distinct. *NLRB v. Amax Coal Co*., 453 U.S. 322 (1981).

By letter dated March 29, 1999, Ellman informed Rosaci that in response to his information requests, unit employees devote 90–120 man hours per year, performing work outside the facility, and 40-50 percent of its unit production and maintenance work is subcontracted outside the Brooklyn facility, and specified the nature of the work.

11. The March 31, 1999 Meeting

At this meeting Rosaci told Ellman that the Union would sign a contract including employees performing offsite work in the unit, but part of the Union's consideration is extra pay for outside work. Rosaci asked how many employees performed outside work, because Ellman's previous letter had only provided estimates of gross hours. Rosaci asked if it was one, two, three or ten employees doing all that work? Ellman replied that it was not one employee, but he doesn't know how many employees? He again suggested that Rosaci "ask your people." One of the Committeemen stated that he had never worked outside the facility.

Ellman then explained the type of work involved outside the facility as assembling, and setting up displays at trade shows.

Rosaci asked about the 40-50% figure on subcontracting previously submitted by Ellman, and Ellman explained that it was volume dollar-wise. Rosaci also asked again for Respondent's reasons for subcontracting various products and tasks. Ellman replied, "because, we choose to." Rosaci responded, "that's not an answer for us. We'd like to know why. Maybe there is a way for us to keep some of it in house. Is it because of skills, cost, equipment"? Ellman repeated his prior answer, "because, we choose to." Rosaci pointed out "that doesn't explain it." Ellman concluded the discussion of that topic with, "you have my answer."

Ellman then asked for the Union's position on Respondent's wage offer. Rosaci replied that the Union rejected the proposal, and there is no counter at this point.

Rosaci asked if the classifications listed by the Union were acceptable. Ellman replied that classifications are not necessary. Rosaci said that Respondent had proposed seniority by classification. Ellman replied, "read that section." Rosaci said that he had read it, and since Respondent proposed seniority by classification, he did not understand how Ellman could say classifications are not necessary when it proposes layoff by classification. Ellman responded that the classifications are in the Board certification. Rosaci replied that the Board certification listed only some duties, and production (in the certification) encompasses some jobs not listed. Ellman answered, "that's your certification."[10] Rosaci said, "forget it, I'm not going to get an answer here—let's go on, we can't keep dancing in circles."

Rosaci asked about the Union's proposal on wash-up and rest periods. After a caucus, Ellman stated that Respondent accepted the Union's proposal for two 10-minute breaks per shift, but that Respondent would determine the times for the breaks. Rosaci dropped the portion of the Union's proposal,

[10] At the time Respondent employed nine employees in a number of classifications not listed in the certification.

that called for a 15-minute break on overtime. However, Rosaci said that the Union wanted set time for coffee breaks, but would be flexible in case of an emergency. Ellman insisted that Respondent wanted flexibility to determine the time of breaks. Rosaci replied that he could not agree to that, and suggested they move on to the health plan proposal. Ellman stated that Respondent would pay 20 percent of the premiums for a single employee and the employee the remaining 20 percent. Also the employee would pay the difference between single and family plan coverage. Rosaci responded that Respondent's last proposal was for 85 percent paid by the employee and Respondent would pay 15 percent for any level of coverage. Ellman answered that the percentage may be right, but Respondent did not propose the same payment for single and family coverage. Rosaci insisted that his proposal was the same percentage for single or family coverage. Ellman replied that he didn't recall that.

Rosaci then turned to the wash-up proposal. He indicated that he had been informed during a caucus, that the employees currently receive a 10-minute wash up at he end of the day, instead of the 5-minutes wash up at the end of the shift. Ellman reminded Rosaci that Respondent had accepted the Union's proposal of 5 minutes. Rosaci asked, if he wanted to cut the employees wash time? Ellman answered that it was the Union's proposal. Rosaci replied, that the Union modified its proposal to include the 10 minutes that the employees already have. Ellman made no response to this request.

On health insurance, Ellman said, that Respondent would provide COBRA for employees, laid off for 6 months and for retirees, as required by law, but rejected the Union's demand for life insurance coverage and for a pension plan.

The parties then discussed other issues such as minimum wage rates, merit increases, personal leave, time for calling in sick, management rights, and drug testing. No agreements were reached on any of these issues.

The parties agreed to meet again on April 14, 1999.

On the same day, March 31, 1999, Director Blyer refused to issue complaint with respect to Respondent's charges in 29–CB–10726, and sent the following letter:

> March 31, 20001
>
> Regency Service Carts, Inc.
> 337-361 Carroll Street
> Brooklyn, NY 11231
>
> Dear Mr. Ellman:
>
> As a result of the investigation it appears that, because there is insufficient evidence of any violation of the Act, further proceedings are not warranted at this time. I am, therefore, refusing to issue a Complaint in this matter.
>
> The investigation did not establish that Shopmen's Local Union No. 455 of the International Association of Bridge, Structural, Ornamental Iron Workers, AFL–CIO, herein called the Union, has unlawfully failed or refused to bargain collectively with Regency Service Carts, Inc., herein called the Employer, by refusing to furnish requested documentation necessary, relevant and material to bargain over union proposals; and by demanding the inclusion of invalid, unlawful or non-mandatory proposals, as alleged in your charge.
>
> Rather, in regard to your information request, in your letter of November 11, 1998, to the Union, insofar as your request calls for the production of minutes of meetings of trustees of the Funds, there is no evidence that the Union has such information and even if it did, such information, because of its confidential nature, would not be disclosable to you.
>
> In regard to the twelve enumerated items of information that you sought in your November 11, 1998, letter, since the Union has agreed to withdraw any proposal regarding the Employer's participation in the Welfare Plan, I note that you now agree that you no longer require this information, (items 7 through 12). With respect to items 1 and 2 of the request, it appears that the Union has now turned over, or is in the process of turning over, these items of information to you. With respect to item seven thereof, I also note that the Union appears to have answered your query in its March 26, 1999 letter. As to the remaining portions of the request contained in paragraphs 3, 4, 5 and 6 thereof, the Union continues to maintain that it does not have this information but that such information is in the hands of the Fund. There is insufficient evidence to establish that the Union does possess this information. Where an employer and union can both request information from such a Fund the Board does not require the Union to make the request. See *American Commercial Lines*, 291 NLRB 1066, at pg. 1084 and 1085 (1988). Here, although there is evidence that you have asked the Fund directly for this information and it has been denied to you, and the Union has not, to date, sought this information from the Fund on your behalf, there is no reason to believe that the Union would be more successful than you in obtaining said information. Also, I note that your request for this information was made to the Fund Manager, in a letter dated March 16, 1999, and that said Manager advised you, in a letter dated March 18, 1999, that you should make your request of the Trustees of the Fund since he was not authorized to disclose it. To date, you have made a request directly to the Fund Trustees. In sum, I do not believe Board law requires the Union, in the circumstances described above, to request that the Fund provide you with the information you seek, particularly where there is no reason to believe it would have any more success than you in securing the information. Moreover, I note that you have not exhausted your opportunities to obtain the information directly from the Fund, since you have not submitted your request to the Fund Trustees.
>
> With respect to the allegation of the charge that the Union has insisted in bargaining upon changes in the certified bargaining unit, the evidence shows that the parties have been meeting since the summer of 1998, to reach agreement on a collective bargaining agreement. During the course of the negotiation sessions, it appears that the Union had proposed expanding the recognition clause to include classifications other than those certified by the Na-

tional Labor Relation Board in Case No. 29–RD–758. As the Union, by its attorney, has now notified the Employer in writing that it will no longer insist that the recognition clause be expanded, this matter appears to have been resolved and is not moot.

With respect to your allegation regarding the Union's proposed union security clause, I note that this allegation has now been withdrawn by you.

In these circumstances, and I the absence of evidence that the Union violated the Act in any other manner encompassed by this charge, I am refusing to issue a complaint in this matter.

By letter dated April 9, 1999, Ellman advised Rosaci that because of hearings at NLRB, Region 2 and 29, he could not guarantee attending the next scheduled session, and asked Rosaci to advise whether he wished to reschedule for a more firm date or retain the scheduled day. Rosaci responded that he wished to keep the scheduled date.

By letter dated April 13, 1999, Kupferberg requested additional information from Ellman regarding subcontracting, warning letters, workers paid the minimum wage, workers who received merit increases, and who requested and were denied paid sick or personal days; and Respondent's current policy concerning how much advance notice is required for sick and personal days.

By letter faxed to Rosaci[11] dated April 14, 1999, Ellman's secretary wrote to Rosaci confirming a message left on his voice mail that day, cancelling the meeting for the same day, because Ellman was still tied up in a hearing and Connie Pezulich was taking her husband to the hospital. Rosaci was requested to contact her to reschedule.

By letter dated April 16, 1999, Kupferberg confirmed to Ellman that he had cancelled that week's meeting, and suggested five more dates between April 21 and 27 for the next session.

By letter dated April 16, 1999, but not faxed until April 19, 1999, Ellman's secretary advised Rosaci that Respondent would not be available until after April 28, 1999, and asked the Union to provide her with additional dates.

By letter dated April 19, 1999, Kupferberg wrote to Ellman proposing dates of April 29, 30, and May 3, 4, or 5.

Kupferberg wrote again to Ellman on April 27, 1999, asserting that the Union had received no response to its proposed negotiation dates from April 29 to May 5.

By letter dated May 3, 1999, Ellman's secretary wrote to Rosaci confirming the next meeting for May 5, 1999, and claiming that on April 23, 1999 her office had sent a letter confirming that date. (Rosaci never received the alleged April 23, 1999 letter.)

By letter dated May 3, 1999, Kupferberg confirmed the May 3, 1999 meeting.

12. The May 5, 1999 Meeting

Rosaci asked Ellman about the Union's prior information request, and Ellman replied that he had previously responded by letter. Rosaci denied having received same. Ellman made a call to his secretary, and reported that his secretary had told him that she sent the letter on April 23, 1999, and would fax another copy to Rosaci immediately. Rosaci noted discrepancies in Respondent's proposals on health coverage, and Ellman indicated that he would check on it and let the Union know what it is proposing.

They discussed sick leave, and Rosaci reminded Ellman that on October 28, 1999, the Union considered sick leave and personal days interchangeable. Rosaci informed Ellman that the Union agreed to Respondent's proposal dealing with deductions from employee pay.[12] Rosaci also provided Respondent with the Union's proposed management-rights clause.

The parties then turned to a discussion of drug testing. The Union agreed with Respondent that drugs are dangerous and that Respondent could deal with it by testing for probable cause, subject to arbitration. Ellman however, insisted on random drug testing, and after listening to the reasons given by Rosaci against such a process, Ellman stated, "I won't change my mind." Rosaci continued to protest this position, and Ellman replied, that Respondent wanted language with the greatest ability to its protection and freedom, and added, "we want a contract where we haven't lost control of our business."

The subject then turned to the Savings Clauses in the respective agreements. Ellman withdrew Respondent's proposal B, since Rosaci asserted that it wasn't necessary. Ellman agreed and it was withdrawn.[13]

Rosaci rejected Respondent's zipper clause, stating that many things can come up later that needed to be dealt with. The parties agreed to 60–90 day window period for modification of the agreement, but rest of the language in the Union's proposal were unresolved.

The parties the engaged in an extensive discussion of safety issues, and Pezulich indicated that Respondent had complied with some of the recommendations of the inspector, such as purchasing an electric forklift, and was looking into several other areas.

Rosaci asked about the Family Medical Leave Act, and Ellman stated that since Respondent had only 49 employees, it was not covered.

At 3:45 p.m., Ellman said that he had to leave at 4 p.m. Rosaci indicated that he wanted to discuss the Grievance Section, and made a proposal for Chief and Assistant Stewards. Ellman did not oppose the appointment of stewards, but he firmly opposed any extra benefits or entitlements for the stewards. He therefore rejected the Union's demands for super seniority, seniority in classification, that the steward not be discharged for performing his duties[14] or even advanced notice of discharge or layoff for stewards. Rosaci stated that the stewards were in a different situation than other employees, were a

[11] The letter was faxed at 11:50 a.m. The meeting was scheduled to start 1:30 p.m.

[12] This provision provides that there shall be no deduction from employees pay unless required by law or unless mutually agreed to in writing by Respondent and the employee.

[13] This proposal states essentially that if Federal and State Legislation require wages, hours or overtime different from the agreement, these requirements will become part of the agreement.

[14] Ellman explained that the discharge of a steward is already arbitrable and the steward is a member of a protected class.

go between, between workers and management and merited a little different treatment. Ellman responded that, "the short answer is the employer signs the checks."

Rosaci asked to meet on May 11, but Ellman replied, the next week is out, and Pezulich was unavailable from the 18th on, due to a trade show. They agreed on May 21, 1999 for the next meeting.

When Rosaci returned to his office after the meeting, he saw a fax cover sheet from Ellman's secretary, received at the Union at 1:55 p.m. It enclosed a copy of a letter allegedly dictated but not read from Ellman dated April 23, 1999, which confirmed a May 5, 1999 meeting, and responded to Kupferberg's April 13, 1999 information requests. The response provided some information, stated that some information did not exist, some information was previously provided, and as to other information requested, asked the Union to detail the relevance of the requests.

By letter dated May 20, 1999, Kupferberg explained the relevance of the requested information for the amount of work contracted out, warning letters issued, merit increases and personal days. The letter also asked for clarification of Respondent's proposal with regard to health benefits.

13. The May 24, 1999 Meeting

At this meeting, Pezulich was not present. Rosaci asked why she was not there, Ellman replied that she "had other things go do". Rosaci replied that he hoped that next time Pezulich was there. Ellman answered "that's up to the Company. I'm here to represent the Company."

After a discussion of Respondent's proposals that employees sign post employment forms, and that employees working a casino be bonded, the discussion turned to Respondent's medical proposal. Ellman explained that its proposal was 20% of single coverage, and the Union must had misunderstood, when Rosaci asserted that it had offered a % for either single or family. Ellman added however, that its offer was not "etched in stone; we're open to discussion on everything."

Rosaci asked about the discrepancies on pay periods, pointing out that Respondent had gone from pay every two weeks to every week to every two weeks. Ellman replied that the Union's proposal for weekly pay was not rejected. Rosaci reminded Ellman that he had agreed to weekly pay on March 11, 1999. Ellman answered that he did not recall such an agreement and he would check on it. Rosaci stated that if its current practice, and he's agreed, why not just confirm it. Ellman responded that the did not believe it was a problem, but "I can't agree, my client is not here now." Rosaci observed that was the importance of having Connie there.

Rosaci added that Connie has said at the last meeting that she would find out about various safety issues, which he listed, and Ellman took notes. Ellman told Rosaci that he would find out and would like to start training. Rosaci explained that there were important safety issues, and Pezulich said she was going to address it and she is not here. He added that the Union had agreed to commencement of training, but it was important to correct the hazards, particularly verification. Ellman said, "I hear you."

The topic then turned to the authority of the steward, and Ellman agreed to discuss matters with the steward, but only on his own time.

Rosaci propose a step grievance procedure with time limits. The parties gave their positions with regard to time limits, and possible exceptions thereto. No agreements were reached.

Rosaci then proposed meeting on June 9, 10, or 17, but preferred earlier dates. Ellman replied that Connie was not there, and he couldn't give Rosaci his availability, because he didn't trust his secretary. Ellman added that she hadn't written this meeting in. Ellman stated that he would check with Pezulich and get back to Rosaci.

By letter dated May 20, 1999, Ellman wrote Rosaci that the proposed June 10, 1999 date was acceptable.

By letter dated May 27, 1999, Kupferberg requested information concerning bonding of employees, plus an updated list of employees hired, since some employees had been hired without notification to the Union.

Kupferberg and Ellman subsequently exchanged letters dealing with the Union's objections to the Respondent's employee data from, and Respondent's reasons for requiring that the form be signed.

14. The June 10, 1999 Meeting

Pezulich was once again not present at this meeting. Rosaci asked if she was coming. Ellman replied that she "had better things to do." Rosaci responded that he thought it was important for her to be there. Ellman smiled and shrugged his shoulders.

Ellman handed Rosaci a letter, dated June 9, 1999, which responded to the Union's prior information requests. It included the updated list of unit employees[15] and safety information. One of the names on the list was not legible. Since Pezulich wasn't there, Ellman needed to make a phone call, in order to determine that the name was Michelet Verdul.

Rosaci asked about weekly pay, which had been agreed to and Rosaci had given Ellman the date of the agreement. Ellman said that Respondent did not have any problem with weekly pay, but that it did not relinquish its right to change it in the future. Rosaci replied that it was agreed upon on March 11, and "now you're changing your mind." Ellman responded that he did not know if the issue came up on March 11, but Respondent did not object to weekly pay. However, he added "we reserve out right to change it in the future." Ellman added that in negotiations positions change.

Rosaci stated that Ellman last time raised holiday pay not being counted toward the forty hours needed in Respondent's overtime proposal. Ellman asked for the date. Rosaci replied November 10. Ellman said his records show November 16, but admitted that it had been agreed to.

Jury duty was brought up and discussed, and Rosaci indicated that committeeman Albert Sanderlin was entitled to such pay. Ellman had called Pezulich on the phone and told her to pay Sunderlin $40 and to deduct taxes.

[15] The list did not include the name of Lacona and did not list any employee as a sprayer.

Rosaci asked about the Union's information request of April 13, and that the Union had answered his inquiry as to the relevance of the information on May 20. Ellman replied that he was still researching Respondent's obligation to supply that information.

Rosaci proposed that Respondent implement the 25-cent wage increase while discussions continue. Rosaci pointed out that Ellman indicated previously that his offer was low and he would go higher. Rosaci stated that the Union would compromise, but the men have been without increases for seven to eight years, and urged that Respondent's offer be implemented while discussions continue. Ellman replied that he would pass the request on to the employer, but not with his recommendation. He said that he didn't believe it was appropriate to implement while economics are unsettled and all costs are not in place. Rosaci expressed disappointment that Pezulich was not there to hear the Union's argument. Ellman replied that he would relay it to them. Rosaci complained "that's a pretty difficult situation for us. You're against a proposal, and I must rely on you to make our argument to the employer."

The parties talked about medical plans, management rights, and which forum to use to select arbitrators. No agreements were reached on these issues.

After further discussion, the parties did reach agreement on the Union's proposal that if Respondent implements a second or third shift, it would negotiate with the Union on the terms and conditions of those shifts.[16]

The Union modified its proposal on overtime pay after 8 hours in a day, Monday through Friday. Ellman rejected this modification and stated that he wanted overtime after 40 hours per week, and told Rosaci that the Union had agreed to this on October 29. He suggested that Rosaci check his notes. Rosaci checked his notes, and disputed that the Union had agreed to that proposal. Ellman replied, "It doesn't matter."

The parties discussed holiday pay, and confirmed that Respondent had agreed to increase holidays by two half days before Christmas Eve and New Year's Eve, which amounted to two extra half days.

Ellman stated that Respondent currently gives five sick days and three personal days a year. Rosaci asked if Respondent willing to continue the personal days. Ellman replied, that he didn't know, he'd find out.

Rosaci indicated that on October 28, the Union had accepted Respondent's proposal that holidays falling on Saturday and Sunday, be celebrated on Monday. Ellman asked why didn't Rosaci ask his people if they'd rather get the extra days pay instead of the day off. Rosaci replied that he has spoken to his people and that the Union accepted his proposal. Ellman responded that he never proposed that, but that it was just a statement of Company policy at the time. Rosaci replied that Ellman had said the practice would continue, and Ellman continued to insist that he was just stating company policy at the time. Rosaci stated, "You're very difficult to deal with. Everything changes, you don't remember. Ellman replied, "thank you." The parties agreed on the next meeting for June 24, 1999.

By letter dated June 11, 1999, Kupferberg asked Ellman for additional safety information, and indicated that the Union was still waiting for the information requested in his April 13, 1999 letter which relevance was discussed in Kupferberg's May 20, 1999 letter.

15. The June 24, 1999 Meeting

Connie Pezulich was once more not present at this meeting, and no explanation was given for her absence.[17]

Shortly after the meeting began, Ellman took a phone call. After Ellman got off the phone, Rosaci asked for new employee information and information on Lacona. Ellman responded that the information is not necessary. Rosaci explained that he needed to see Respondent's wage rates, since the parties had different minimum rate proposals. Ellman replied, "even if you were entitled to the information, it can't make a difference in our position. We wouldn't agree to a contract with more than a Federal minimum wage." He added that if the Union got a contract, the minimum rate would be the federal minimum wage. Rosaci answered that the Union needs tools to develop arguments and proposals. Ellman answered, "You know our position."

Rosaci then asked why Respondent did not call the Union for referrals when it was hiring. Ellman answered that Respondent would agree to give notice and consider applicants if there was a contract. Ellman added that Respondent did not need the Union for referrals. He then said, "You don't get it. You go as long as you want, impasse is not an issue. Sooner or later, defecate or get off the pot."

After a discussion of some safety issues, Ellman informed Rosaci that the Union's information request on subcontracting is not relevant, because "there won't be a contract with any limitations on subcontracting." Rosaci responded that if the Union knew reasons, they could make proposals, for example training, if work is given out because of lack of skills, or they might give the company an economic incentive to purchase machinery so work could be kept in house. He added that it was important for the Union to keep as much work in house as we could. Ellman then drew a red line on a note pad. He said that this is a "line in the sand, there won't be any contract with a prohibition on subcontracting".

Ellman took another phone call. Ellman told Rosaci that no one is currently bonded. Rosaci reminded Ellman that the Union had asked for information on rules, costs and period of bonding. Ellman replied, again, "no one is bonded. " Rosaci asked if it would be needed in the future. Ellman replied; "I don't know, possibly."

Rosaci asked if Respondent was still proposing a zipper clause. Ellman said yes. He then drew another red line on a paper, and said "that will be part of the contact too." Rosaci replied that the Union needed to ask these questions, if Ellman proposed such a clause, that there were no other items that

[16] The agreement was reached, when the Union withdrew two other clauses of its proposal dealing specifically with hours of work for a second or third shift.

[17] In fact, Connie Pezulich did not appear at any further meetings. Nor was any other representative of Respondent present, other than Ellman.

needed to be negotiated during the life of the contract, "we need to do it now." Rosaci added that it was not reasonable for Ellman to make that kind of demand, and then give Rosaci a hard time when he asked to raise other issues. Ellman responded, "we're not going to be reasonable. We want what we want and I'll sit here for the next three years."

Rosaci again requested that Respondent implement the 25-cent wage increase that it had proposed. Ellman refused, asserting that it was inappropriate and that when there is a complete contract, and Respondent knew the total cost picture, employees would receive a raise. Rosaci suggested that Respondent could always implement it, and when other proposals came up, it could say it goes beyond what it wanted to spend Ellman answered, "we could, but we won't." Rosaci reminded Ellman once again that employees had been without an increase in years. Ellman replied, "the men made their choice to go through the process with you and that's what we're doing, we're going through a process."

Rosaci asked for Ellman's position on personal days. Ellen then called Pezulich. Ellman informed Rosaci that he would get the Union information on two names, but Lacona was a carpenter. Rosaci replied that Lacona had voted in the election and that Respondent's position at the time of the election was that Lacona did metal work. Ellman told Rosaci to check the DD and E.

After a discussion of personal days, and bargaining unit, Ellman rejected the Union's proposal prohibiting non-bargaining unit people doing bargaining unit work.

Rosaci again asked about Respondent's position on a Saturday or Sunday holiday celebrated on Monday. Once again, Ellman stated this was the Company's practice, and suggested that Rosaci asked the men what they want. Rosaci responded that the Union wanted to accept Respondent's proposal, and asked again "do we have agreement on that?" Finally, Ellman said yes.

After receiving another phone call, Ellman informed Rosaci that he needed to go to Newark, to pick up a relative. Rosaci suggested July 5 for the next meeting. Ellman replied that he was busy until the week of July 19. Farynairz asked if the meeting that week could be on a day other than Wednesday, because he had a parking problem. The parties agreed upon July 21. Rosaci asked if they couldn't get anything sooner, since July 21 was four weeks away. Ellman replied, "We haven't been accomplishing much. It doesn't matter if its, two or three or four. Can't do it anyway."

Following the meeting, Rosaci received the safety date sheets that the Union had requested. On June 28, 1999 Rosaci received the risk management documents from Ellman.

On July 16, 1999 Kupferberg wrote to Ellman, asking for any reason that employees Eduardo Guerrera and Rocco Lacona had been omitted from the list of employees provided to the Union, and asked for a current list of employees with other information concerning such employees.

16. The June 21, 1999 Meeting

The parties began by discussing the status of Lacona. Ellman stated that the Union had challenged Lacona's eligibility based on carpentry and they agreed he was not part of the unit. Rosaci responded that Respondent's position at the Board Hearing involving unfair labor practices and challenged ballots, was that Lacona was part of the unit.[18] Ellman replied "not today". Rosaci added that Lacona's name appeared on the list of bargaining unit members, originally supplied by Respondent to the Union. Ellman asked to see the list and Rosaci showed it to him. After seeing Lacona's name on the list, Ellman stated, "there was a mistake that he was on the list." Rosaci also reminded Ellman that at one point the Union had asked to clarify Lacona's wage rate, and Respondent did. Ellman responded that it was a mistake that Respondent had answered Rosaci.

Rosaci then asked about Eduardo Guerrero. Ellman replied that Guerrero was a shipping and receiving department manager, and excluded from the unit. Rosaci responded that Respondent had previously included Guerrero on the list of bargaining unit employees. Ellman answered, "If we did, we made a mistake."

The parties the discussed the Agreement Clause, management rights clauses, and the use of temporary labor. No agreements were reached.

Rosaci agreed to Respondent's proposal for 10 holidays (including two additional half days) and 3 personal days. Ellman also agreed to approve a union proposal that if a holiday fell on an employee's vacation, the employee would get paid for the holiday. Ellman rejected all the other union proposals with regard to holidays.

On Section D of the Union's Proposal, which provided for mutual agreement with respect to changing of a holiday, Ellman said that Respondent rejected it. Rosaci told Ellman that he didn't reject it on October 28; he said that he would consider it. Ellman answered, "I reject it now." Rosaci asked for the reason. Ellman answered that; he "doesn't think that the Union represents the interests of the employees." He added that he wants "majority of the employees and the employer to decide."

The discussion then turned to the Union's proposal on reporting pay. This provision dealt with employees who were injured on the job and were sent to a hospital or a doctor. It provided that if an employee who is sent to a doctor and returns, he will be paid for the time spent at the doctor, and if an employee is admitted to a hospital or told by the doctor not to return to work, the employee will be paid for the day. Ellman stated that Respondent had agreed on the latter portion of the Union's proposal (pay if employee is admitted to a hospital, or if the doctor tells him not to return to work), but only if the remainder of the Union's proposal was withdrawn. Rosaci replied that this was an inconsistent position, i.e. The fact that Respondent would pay an employee when he's told to go home, while if an employee goes to a doctor for treatment and returns, Respondent would not pay for the time at the doctor.

Ellman then got angry, and made a phone call. When he finished with the phone call, he told Rosaci, "now we reject Section C totally. Now its consistent." Rosaci then asked if this

[18] Indeed based on the testimony of John Pezulich, the ALJ affirmed by the Board, found Lacona to be a member of the unit and an eligible voter.

was contrary to current company policy. Ellman shrugged and responded that he did not know.[19]

After a discussion of whom to use as a contract arbitrator, Rosaci asked if Respondent had a proposal on sick leave. Ellman answered, "That's economics. I'm not sure where we're going on economics. I can't make a proposal now."

The parties discussed a new date. Rosaci asked for an early date, but Ellman stated that his next available date was August 24, 1999.

By letter dated August 9, 1999, Kupferberg requested Ellman to produce various items of information, such as safety that he failed to produce upon previous requests, information on subcontracting, warning letters, workers paid minimum wage, and current policy with regard to advance notice for sick and personal day pay. The letter also asked for an updated employee list with accompanying data, safety information, and the dates on which Guerrero acquired supervisory authority and on which Lacona ceased to do bargaining unit work.

On August 11, 1999, Appeals Director, Yvonne Dixon, denied Respondent's appeal from Director Blyer's refusal to issue Complaint in Case No. 29–CB–10726.

> Your appeal from the Regional Director's refusal to issue complaint in the above captioned case has been carefully considered.
>
> The appeal is denied substantially for the season set forth in the Regional Director's letter of March 31, 1999. With respect to the Trust fund minutes, as noted in the Regional Director's letter, you were instructed by the trust fund manager that you should make your request to the trustees of the fund. You apparently have not made such a request of the trustees, but rather argue that because the Union president is a fund trustee, the Union should be required to furnish copies of the minutes. There is no evidence, however, that the Union has copies of these minutes. There is no evidence, however, that the Union has copies of these minutes even if the Local president is a trustee and has access to the minutes in that capacity or that the Union was in de facto control of the fund.
>
> Further, your appeal states that this information was requested only as it relates to discussion of contribution rate increases, financial problems and pending litigation and is therefore relevant to negotiations, regarding the Union's proposal. A review of your requests does not reveal such limitations on the request for Minutes and no argument was advanced establishing the relevance of all trust fund minutes.
>
> Your appeal addresses the failure of the Union to provide requested pension fund plan descriptions and amendments. The file indicates that, subsequent to filing the appeal, you advised the Region that you had been furnished with a copy of the plan itself, but not the amendments. In your March 23 letter to the Union you request copies of all amendments to the plan as reported on form 5500. A review of form 5500 for 1996 shows a reference to an amendment on "June 14, 1995." The Union asserts that it has provided you with all amendments including documents dated June 14, 1999 referred to as "rules and regulations" and "restatement of the plan of benefits." For form 5500 for 1994 refers to an amendment dated "December 5, 1990." Your request letter did not specifically refer to this amendment nor does the Union makes any reference to this specific amendment. Under the circumstances it does not appear that the Union has refused to furnish amendments to the plan. Rather it appears that whether or not there are any further Amendments which the Union could furnish is a minor clarification by the parties.
>
> Accordingly, further proceeding were deemed unwarranted.

17. The August 23, 1999 Meeting

After some discussion on safety and arbitrators, Rosaci asked when Guerrero became a supervisor. Ellman answered that, "it doesn't matter. He is not now and has not in the past been a member of the unit." Rosaci responded that the Union has a retroactive proposal on the table, and Guerrero may be entitled to some money while he was a member of the unit. Ellman drew another line on a pad, and said, "that another line in the sand, no retroactivity."

Rosaci asked about Lacona, and Respondent's assertion that he is a carpenter. Ellman asked if Rosaci had evidence that he did anything else? Rosaci replied that Respondent had contended that Lacona did some metal work. Rosaci asked if he "bounces back and forth." Ellman answered", I'm told he does exclusively carpentry work." After speaking with Connie Pezulich, Ellman confirmed to Rosaci that Lacona is a carpenter.[20]

The parties the discussed various issues such as safety, an exception to the no-strike clause, and sick leave issues. Agreement was reached on a proposal that unused sick time is to be paid at the beginning of the next year of a one-year period, March 1 to February 28.

Rosaci asked Ellman for information on loans to employees. Ellman replied that he would not provide that information, because it's private. He added that if the Union wants to make a proposal on it, make it, and he would consider it.

Rosaci said that there was a past practice with regard to seniority and layoffs. Ellman replied that the company has not had an issue with seniority in the past, but it wanted to retain who they believe is the most productive or efficient in the positions that remain. Ellman drew another line in the sand. Rosaci asked how he measured productivity and efficiency. Ellman replied that Respondent wanted sole discretion to measure it themselves. Rosaci asked about qualifications so the Union could discuss it, and might agree if it was used fairly and consistently. Ellman responded that it had to be the sole discretion of Respondent and there is no need to give details. He added, "we gave the Union a proposal, you know what we want." Finally, Ellman said, Respondent would consider a union proposal, if it offered one.

[19] Previously, Ellman had told Rosaci that Respondent did pay that.

[20] As noted above, carpenters are excluded from the unit.

Rosaci made a proposal with respect to probationary period. The issue was discussed, Ellman offered a counter proposal, but no agreement was reached.

Ellman stated that needed to leave early to go back to his office, and pick up some paperwork for a trip to El Paso. He also gave Rosaci an updated employee list.

Rosaci suggested September 13, 1999 for the next meeting. Ellman replied that was "too soon", and they agreed on September 23, 1999.

Kupferberg wrote to Ellman dated September 1, 1999. He noted that Ellman had still failed to provide information previously requested on various safety and training issues. The letter also noted that Ellman had refused to supply information requested by the Union concerning loans, and the dates that Guerrero and Lacona ceased being bargaining unit employees. He explained why this information is necessary and relevant, and noted that the fact that Respondent has opposed retroactivity, does not remove it as a subject for negotiation. Finally, the Union offered a modified no-strike-no-lockout clause proposal.

18. The September 23, 1999 Meeting

At this meeting, Ellman provided the Union with some of the information that it had previously requested. This included the updated list of employees, warning letters issued to employees, safety information, and letter from the Unemployment Appeals Board with regard to an employee.

Ellman addressed the subcontracting information request, and informed Rosaci that Respondent had no records reflecting the number of hours or dollar amounts of work subcontracted. Ellman explained that Respondent subcontracted various types of work and purchased pre-manufactured components. Ellman provided dollar amounts for the various types of work subcontracted, ranging from $5,000. to $300,000, and stated that most of the work comes from India and Banqladesh. Rosaci asked for the reasons. Ellman replied it could be rush orders, cheaper, i.e., pre-manufactured components are cheaper.

Ellman informed Rosaci that one employee, Trevisano had been given a merit increase, and had it taken away. Ellman also informed Rosaci that employees did receive personal days, had no knowledge of or records of any employee being denied pay for failure to provide advance notice. Ellman added that there was no general rule on advance notice, but he was trying to establish it.

Ellman told Rosaci that he was still studying and seeking information on Seymour Kaye, who the Union had previously proposed as impartial arbitrator. Ellman proposed George Sabatella and said that he would get Sabatella's bio to Ellman.

Ellman gave some information to Rosaci concerning Respondent's past practice on loans to employees, and how they were repaid. Rosaci responded that the information was incomplete, since they were not given the amounts of the loan or the dates. Ellman replied that Respondent had no records and Respondent didn't remember. Ellman said that no interest was charged and there were some payroll deductions used for repayment. Ellman also told Rosaci that Trevisano was the only employee who received a merit increase, and furnished other information with regard to safety.

The parties then discussed the Union's proposed no-strike clause, and the issue of inspection of the premises.

At this meeting, Rosaci questioned Respondent's position on Guerrero. Ellman responded it did not take the position that Guerrero is a statutory supervisor, but that he is and has always been a manager.

With respect to Lacona, Ellman indicated that there was no firm date on his non-bargaining unit status. Ellman added that for at least 18-24 months, Lacona has not performed any bargaining unit work.

Ellman during the course of the meeting, had to go downstairs, because he lost his parking ticket, resulting in a 10-minute delay of the meeting.

For the next meeting, Rosaci suggested October 13, 1999. Ellman replied that was not good for him that week. Rosaci suggested October 20, 1999 and Ellman agreed.

By letter dated September 29, 1999, Kupferberg asked for George Sabatella's resume, and information concerning safety, list of employees paid the minimum wage, information about loans, and amounts of subcontracting during the last year.

19. The October 20, 1999 Meeting

Ellman provided the resume of arbitrator Sabatella. The parties discussed some safety issues, and Ellman made a call to Connie Pezulich to answer some of the questions of Rosaci.

Rosaci asked for names of employees receiving the Federal minimum wage. Ellman provided a list of 5 names and their dates of service.

Rosaci asked about the terminations of certain employees. Ellman provided answers, except for one employee, Earnest Ortiz. Ellman had to call Respondent's office, and found out from "Moe", Respondent's bookkeeper that Ortiz worked for 12 days before being terminated for poor performance and production.

Ellman gave Rosaci's list of employees who received loans, amounts and weekly repay schedule.

Rosaci requested a breakdown of subcontracted fabricated and pre-manufactured components. Ellman replied that 1/3 was for fabrication and 2/3 for pre-manufactured components. Rosaci asked for a breakdown by rush order, large order or cost, but Ellman said that Respondent does not keep that information.

Rosaci wanted to go over what had been agreed to, but Ellman refused, saying that he didn't have the records with him to go over that now. Ellman added that he didn't think that it was necessary at this juncture, and told Rosaci to put it in writing.

Rosaci responded that he believed that it was necessary, considering that there had been disagreements as to positions of parties, Respondent has not been consistent on medical benefits for example, and it is necessary for negotiations to "know where we are." Ellman replied that things have not changed in the last six months. Rosaci rejoined that Respondent had not changed since negotiations started. Rosaci added that it is not only what's been agreed to, it's also current positions and proposals. Ellman stated, "you see the men are shaking their heads, they know you're full of shit." Rosaci responded that the employees were shaking their heads because they know that Respondent keeps changing its positions.

The parties then discussed the Union's proposal for safety inspections. Ellman, after some discussion, stated that he did not have a problem with a safety committee consisting of an employee and an employer's member, but would not agree to have inspections done on company time with pay. Ellman also indicated a willingness for a semi-annual inspection, instead of the Union's once a month proposal.

Rosaci made a proposal on loans to employees, which was discussed, but not agreed upon. The Union deleted its proposal on adjustment of rates at the option of the Union.

Rosaci asked to meet in two weeks to go over the contract and what the agreements were. Ellman said no, send it by mail. Ellman proposed November 17, 1999. Rosaci asked about sooner and Ellman answered, "no way." The parties agreed on November 17, 1999.

Ellman by letter dated October 21, 1999 suggested that the parties meet on November 16 or 18, since he discovered a jury notice for November 12. Rosaci agreed to November 18.

By letter of October 18, 1999, Kupferberg asked for additional safety information, plus additional information concerning the employees who Respondent had asserted were paid Federal minimum wage.

By letter dated November 2, 1999, Rosaci sent Ellman a summary of what the Union believed to be agreements and modifications of the parties' proposals. He asked Ellman to review same, so the parties can discuss any discrepancies at the next session.

20. The November 18, 1999 Meeting

This meeting began 10 minutes late, because Ellman was on the phone. Ellman told Rosaci that he had a strike going on and had to leave early. Rosaci asked what time, Ellman replied that he didn't know, "let's see how it goes."

Rosaci asked some questions about safety issues. Ellman needed to make several calls to Pezulich in order to answer the inquiries made by the Union.

Rosaci asked Ellman for a response to his letter detailing agreements and modifications. Ellman replied that it was his understanding that Rosaci was only to list agreements and that when he (Ellman) saw July 1, 1998, he stopped looking. The parties then discussed several of the items in Rosaci's description of agreements and modifications. Ellman clarified Respondent's Health Care proposal to indicate that it was for the plan currently offered to some of its employees, and that the employees pays the percentage for himself and 100% for any additional coverage. Ellman concurred that the parties had reached agreement on holidays, disagreed that there was agreement on some other proposals, and on others. Ellman said that he would check his notes.

Rosaci asked to meet on December 8, Ellman said that this date was Hanukah. Rosaci suggested December 14. Ellman said no he had a stress test.

Finally, the parties agreed upon December 22, 1999.

By letter dated December 11, 1999, Kupferberg asked Ellman for safety information, as well as a response to the Union's request for $1,000 Christmas bonus.

By letter dated December 20, 1999, Ellman cancelled the December 20, 1999 meeting, due to two funerals, plus the logistics of relocation of his office. He requested that he be called to reschedule. By letter of December 28, Rosaci confirmed a meeting for January 12, 2000. Ellman cancelled this meeting as well, on January 11, 2000, informed Rosaci by letter that he had hurt his back while moving, and requested rescheduling for January 26 or 27, 2000. Rosaci confirmed for January 26, 2000.

On January 24, 2000, Ellman called and left a message on Rosaci's answering machine, that he was canceling the January 26, 2000 meeting, because his mother was ill. By letter dated January 27, 2000, Rosaci suggested February 3, 9 or 10 for the next meeting, requesting the earliest possible date, since Ellman had cancelled the last three meetings.

By letter dated February 2, 2000, Ellman agreed to meet on February 10, 2000.

21. The February 10, 2000 Meeting

After Ellman provided the Union was some safety information, and the parties discussed safety issues, Rosaci asked about the Union's request for a Christmas bonus. Ellman said no, stating that a bonus is part of an economic pie. Rosaci replied that he understood that, but repeated his assertion that the men deserve something in light of having received no increase in years. Ellman responded, "I don't get into the employer's pocketbook. I give them the options and parameters and they make their decision".

The parties then confirmed agreements previously reached, such as Board certification language, shift language, and Saturday and Sunday holiday celebrated on Monday.

On pay for Election day, Rosaci indicated that a voter registration card should be sufficient to allow employees to receive 2 hours pay. Ellman said that Respondent wanted actual proof of voting, indicating that in New Jersey, there are forms signed by a voter, that can be duplicated. Rosaci replied that in New York, voters sign a book. Ellman said that maybe employees can get a receipt. Rosaci replied that she would check with the league of women voters.

Ellman then took time off to talk on the phone involving an unrelated matter involving another Union.

The parties agreed on the Union's proposal with a modification by Respondent, that toilets and washroom would be kept in sanitary conditions with the assistance of unit employees, and to Union proposal that Respondent would provide employees inclement weather gear in the form of a slicker. The parties also confirmed agreements previously reached on a regular payday once a week.

Rosaci noted that on as to wash up time, while initially the parties agreed to "five minutes" at the end of a shift, the Union on May 5, 1999 modified its demand when he discovered that employees currently received 10 minutes. Rosaci also asserted that Ellman had agreed to 10 minutes on May 5, 1999, but Ellman said that he did not have that in his notes. After Rosaci read his notes, Ellman stated, "it was not a major thing", and he would check with the employer.

The parties confirmed agreements on amount of sick days and a 60-90 day window period, and then discussed but did not agree on seniority and a notice of layoff proposal of the Union.

The parties also went over agreements reached and current positions on several other issues, such as overtime, holidays, a grievance and arbitration, payroll deductions merit increases, management rights and no strike - no lockout clauses.

Rosaci asked for the next meeting to be on March 1, 2000. Ellman replied that he would be in Court that day and for the rest of the week. Rosaci asked about March 8, and Ellman agreed.

By letter dated February 14, 2000 Kupferberg requested some additional safety information, plus an updated employed list including related information.

By letter dated February 29, 2000, Ellman notified the Union that commencing March 6, 2000, Respondent would no longer be opened for production except inventory and shipping on Mondays, thereby reducing the workweek for most employees to four days.

On March 1, 2000, Rosaci telephoned Ellman, and requested that Respondent delay the work reduction until after the next meeting, when the parties could discuss it. Ellman answered that Respondent wanted to do it immediately. Rosaci asked why the reduction. Ellman answered that Respondent did not have enough orders. Rosaci asked if subcontracting was in the mix. Ellman said no. Rosaci asked Ellman to put a moratorium on subcontracting and imports, so work could be brought into the shop so employees could work full time. Ellman replied that Respondent was subcontracting because it's cheaper and because of the work load, but he would ask if Respondent would consider bringing work back in. Rosaci asked about a New York State Work Shore Program, and explained to Ellman the nature of the program.[21] Rosaci told Ellman that he would fax over a more detailed description of the plan, which he did by fax on March 1, 2000.

By letter dated March 7, 2000, Rosaci confirmed that March 1, 2000 phone conversation, wherein he had asked Ellman to hold off on the reduction of hours, and or place a moratorium on subcontracting and imports. He also referred to the Work Share Program that he had faxed to Ellman, and indicated that he was awaiting Ellman's response.

By letter dated March 7, 2000, Ellman responded to Rosaci, reflecting that Respondent intended to apply for participation in the "Work Share" program, but that the application requires concurrence by the Union. He enclosed a copy of the application, and asked Rosaci to sign it and return it to Respondent, so it can be transmitted to the State Agency.

22. The March 8, 2000 Meeting

Ellman arrived late for this meeting, asserting that he had been stuck in traffic. The meeting therefore did not begin until 2 p.m. Rosaci asked Ellman for the complete work share application, since he had received only the signature page. He asked Ellman to have it faxed to the NYSERB so that he could look at it, sign it and the men could bring it back to work the next day. Ellman told Rosaci that he needed to wait for either John or Connie Pezulich to return to the shop.

Rosaci asked, if certain kinds of work was presently being subcontracted, and Ellman replied no, "why are you asking?" Rosaci replied that he was trying to explore ways to bring work back, in-house, to avoid a reduced workweek. Ellman also denied Rosaci's previous request for a moratorium on imports and subcontracting.

During a Union caucus, committeeman Fairyniarz informed Rosaci's that work was being subcontracted, as late as Friday.

After the caucus, Rosaci asked which employees were laid off, i.e., subject to the reduced workweek. Ellman replied everyone but shipping and inventory, but he did not have the names there for Rosaci, Rosaci replied that "you knew there was a meeting today, and this is an issue for us." Ellman responded, "you didn't ask for it." Rosaci said that he was asking now and he wanted the names of the employees involved. Ellman answered that "it should be in the application we'll be sending."

Ellman gave some information to Rosaci with regard to training, and Rosaci handed Ellman a copy of new Union proposal on a no-strike, no lockout clause, and it was briefly discussed.

Rosaci stated that employees were confused about vacation eligibility, as to whether it was anniversary date or some other annual date. Ellman replied that he believed that it was anniversary date, but he would find out if it were pro-rated.

Rosaci then recounted the history of the Union's Section 25 on wash up time and breaks. He indicated that initially Respondent accepted the Union's proposal for a 5 minute wash up, but after a caucus, the Union found that the employees were getting 10 minutes, and modified its proposal. Ellman refused at first to agree, but 10 months later indicated to the Union that it was acceptable. The last time it was reviewed, Ellman informed the Union that it was not agreed to, but wasn't a big deal and he'd run it by the Employer. Rosaci then asked if the Respondent was agreeing to a 10-minute wash up? Ellman replied that he would seek more information and try to get an answer from Pezulich. Ellman then asked about breaks, and there was some confusion about what breaks the men had and what the times were? Rosaci asked to clarify whether the men had two 20-minute breaks and one 10-minute wash-up. Ellman replied that he would ask Connie Pezulich and have an answer the day after tomorrow if she was back. He added that Respondent had problems with people leaving work early. Committeeman Mackenzie related that sometimes employees left early, because Supervisor Joseph rushed people out because he had to go home. Mackenzie explained that employees get very dirty from polishing and need time to wash up.

Rosaci added, "As you see, there is confusion on this issue. And Connie once said she wasn't looking to take anything away from the men. Why don't you agree to the 10-minute wash up. Ellman answered that he would see.

Rosaci then mentioned that on election pay, he had called the League of Voters and the Board and confirmed what he had told Ellman earlier, that voters sign a book, and there is nothing given out to prove someone voted. Rosaci reiterated his prior proposal of a voter registration card. Ellman replied that is unacceptable. Rosaci suggested that there is a registry of signatures that could be checked, if Respondent desires. Ellman

[21] The program as set up by the State, which allows employers to create a program where workers can take leave with less work, and get partial unemployment for the portion of the week that they do not work.

replied that puts a burden on Respondent. Rosaci replied that it's the company that wants the proof. Ellman added that the Company was offering the benefit, and suggested that the Union get the proof for employees, since it would be collecting dues from employees.

Rosaci asked what Respondent was doing now in regard to that. Ellman answered that he didn't know, but it was immaterial. Rosaci suggested an affidavit from employees that they voted. Ellman rejected that, stating it doesn't prove that they voted. Rosaci accused Ellman of "being ridiculous", and adding "there is no proof to be had here." Ellman's response to that was, "maybe we should just get rid of the benefit."

Ellman then took a telephone call after which the parties discussed overtime work hours, layoff notice, and restrictions on non-bargaining unit employees performing bargaining unit work. No agreements were reached on any of these issues.

Rosaci asked Ellman for a date for the next session. Ellman replied, "which year". Rosaci suggested the first or second week of April. The parties agreed on April 11, 2000.

By fax dated March 8, 2000, the Union received a copy of the work share application and a list of employees no longer employed as of February 10. 2000. Neither the list of employees participating in the program,[22] nor the list of employees no longer employed, listed either Lacona, sprayers Louis Lopez or Rafael Rodriguez, or Guerrero.

By letter dated March 10, 2000 to Ellman, Rosaci asked why five named employees were not included in the work share program and if they are working full time, and the work they are performing. Rosaci repeated his request in a March 15, 2000 letter to Ellman, stating that he wanted to get the application filed as soon as possible. Rosaci also faxed to Respondent, on the same day, a signed copy of the application by the Union.

Ellman responded by fax on March 15, 2000, and explained in detail why the five named employees were not on the list. It added that the list is accurate and unless there is an objection by the Union, it will be filed as prepared.

By letter dated March 17, 2000, Kupferberg confirmed the Union's requests for Respondent's current vacation policy, and current policy with regard to requiring proof of voting to be eligible for 2 hours pay on Election day.

Ellman responded on March 25, 2000, and stated that vacation pay is calculated based upon anniversary at date of hire, and there was no past policy with respect to requiring proof of having voted to be eligible for 2 hours of pay on Election Day.

On April 2, 2000, Rosaci called Albany, and ascertained that Respondent had not, as promised, filed a work share application. He then called Ellman and asked why Respondent had not filed. Ellman replied that New York State refused to tell Respondent "what it would cost." Rosaci responded that Respondent had agreed to apply and said nothing about costs.

Ellman responded that, "we wouldn't do anything without examining costs."

On March 12, 2000 the Union filed a charge in Case No. 29-CA-23445, alleging that Respondent violated Section 8(a)(1), (3) and (5) by reneging on its agreement to participate in the work share program, and doing so in retaliation for employees—union support or activity. Director Blyer, dismissed the Union's charges on June 30, 2000, finding essentially that Respondent "had legitimate second thoughts about participating, because of the potential costs to it. The Employer showed good faith by virtue of the inquiry it made of the State. Only when the State could or would not estimate the Employer's potential costs, did it decline to pursue the matter further."

Further, the Director concluded that Respondent's ultimate decision to decline to participate was "based on legitimate business reasons which do not constitute a violation of the Act."

This dismissal was appealed, and the dismissal was affirmed by the Director of Appeals on April 21, 2000.

23. The April 11, 2000 Meeting

Rosaci began by asking when vacation was paid? Ellman responded, "You don't have to ask me, ask the people." Rosaci noted that the men all had different answers. Ellman directed Rosaci to make a proposal. Rosaci repeated his request for company policy, and observed that the men had asked Respondent for vacation pay, are told yes or no, that they either can or can't take vacation, but they don't know the reasons. Ellman replied, "Fuck you." Rosaci answered, "no, fuck you, all we need is a company policy." Ellman repeated, "fuck you" and Rosaci responded if Ellman didn't want to give him an answer, he'd put it in writing. Ellman responded, "I'll wipe my ass with it like I do with your other requests".

Rosaci then asked if Respondent was paying the employees election pay now? Ellman answered, "It has nothing to do with going forward." Rosaci replied, that he wanted to know why Respondent is asking for proof for voting when they haven't asked before. Ellman answered, "Because, that's the way I want it." Rosaci repeated his request as to whether Respondent was paying the men now? Ellman asked the committee members present, "are you getting paid now".? Faryniarz replied, yes. Ellman then told Rosaci, "See, you can get your answer from the committee." Rosaci disagreed, stating that the men know about themselves and maybe what they had heard, but only the Company could say for sure what's being done shop wide. He again asked Ellman for an answer. Ellman replied, "its not material"? Rosaci asked if Respondent asked if Respondent didn't ask for documentation in the past and actually paid the people regardless of whether they voted or not, why is there a difference now? Ellman answered, "because we're negotiating a contract, and contract negotiations outcome can be up or can be down. This Company wants not to give benefits for the people unless they are eligible for it." Rosaci commented, "Well, the only difference is the Union. Ellman replied, "I didn't say that", and as he spoke, Ellman got out of his chair, looked out the window, began whistling and began rocking back and forth on his feet. As Rosaci began to speak, Ellman continued to look out the window and whistle. Rosaci inquired, "are you negotiating or are you watching the taxi cab". Ellman responded, "yes, go ahead."

Rosaci asked about the men using a personal or sick day to get paid for Monday, April 24, (which is a layoff day), since the men are already taking off on Good Friday for religious obser-

[22] It listed 25 employees as participating in a 20-percent reduction of hours.

vance and didn't want to lose the extra pay. Ellman answered, "I do not understand you." Rosaci replied, "stop looking out the window and pay attention", and repeated the question. Ellman responded, "This has nothing to do with contract negotiations." Rosaci replied, that he was raising the issue, "we are here, and we want to talk about it." Ellman said "I will get back to you."

Ellman confirmed that there had been no increase in subcontracting or in the amount or change in the nature of imported work. Ellman was continuing to stand and whistle. Rosaci asked if Ellman wanted him to dictate or write a proposal on subcontracting. Ellman answered that Rosaci should send it in the mail. Rosaci insisted that he wanted to discuss it now, and if Ellman didn't want it dictated, he would write it and get copies next door. Rosaci wrote it and left the room to get copies made. While Rosaci was out of the room, making copies of the proposal, Ellman told the Union Committeemen present, "This is your choice guys."

When Rosaci returned he gave Ellman the Union's new proposal. Ellman read it and said "no." Rosaci asked why? Ellman replied, "we won't agree to restrictions on subcontracting. We want to do what we deem is necessary for us. Your proposal doesn't meet our concern." Rosaci asked what was his concern? Ellman stated, "unlimited ability to subcontract." Rosaci reminded Ellman that when the parties discussed subcontracting previously, Rosaci had asked for reasons. Ellman responded, we're not going to agree to any restrictions. There could be 2000 other reasons. We're not going to agree to a contract that restricts our right to subcontract for any reason." Rosaci asked if Respondent valued its employees. Ellman reiterated, "We will not restrict our rights to subcontract…. It's the same position as two years ago. I'm two years older and the men are two year poorer."

The Union caucused, and when they returned, Ellman was on the phone. Rosaci wrote out a bulletin board proposal, after which Ellman received another phone call and left the room. Rosaci left copies of this proposal and left the room himself. When Rosaci returned, Ellman was still on the phone.

Ellman after getting off the phone read the Union's proposal, and asked various questions about it. The parties' discussed the proposal. Ellman agreed on the concept of a bulletin board, but there was disagreement as to who would pay for it and what kind of items could be placed there. Ellman took another call, and the parties continued to discuss the bulletin board, with no agreement reached.

Rosaci asked for Respondent's proposal on promotions. Ellman answered that it was in Respondent's management rights clause. The parties discussed the issue, and Ellman's position was essentially, "we will promote who we believe is qualified and we'll determine that." Ellman then got on the phone again. When Ellman got off the phone, Rosaci complained that the Union didn't want Respondent's decision (on promotions) to be arbitrary. Ellman answered, "You're not going to get it." Rosaci inquired, "why wouldn't you want to treat people fairly."? Ellman responded, "If you don't like it, there's the door. Welcome to America."

Rosaci then moved on to training, and asked if Respondent would consider in house training. Ellman asked if Rosaci had a proposal. Rosaci said that he needed to discuss it, and ask questions before making a formal proposal. Rosaci asked if Respondent had trained for positions before? Ellman once more told Rosaci to "ask the committee". Rosaci responded that the committee doesn't know, that his questions deal with the shop, and the committee knows only about the area where they work. Rosaci added that it is Respondent's obligation to answer, and Respondent had official information on it. Ellman responded that if the Union had a proposal Respondent would consider it. Rosaci asked about an answer on Good Friday. Ellman made a call and told Rosaci that any employee that wants to take off Good Friday, its okay if they have vacation or sick or personal time they can use it, but if they want pay, let Respondent know by April 14 in writing. The parties agreed on May 23, 2000, for the next meeting.

By letter dated April 12, 2000, Ellman provided Respondent's policy on computation of vacation time, stating that if there is confusion amongst employees as whether the above contradicts oral statements of management, the above recites current policy.

Kupferberg wrote to Ellman on April 14, 2000, confirming in writing several requests for information made orally by Rosaci during bargaining. They include Respondent's current practice of paying employees 2 hours' pay on election day whether or not they vote, whether this practice is pay in addition to normal 8 hours' pay or 2 hours' extra pay, or definition of qualifications, skill and ability required for promotions, list of employees whom Respondent has in the past promoted from within the unit or from the unit to positions outside the unit, plus accompanying information about these promotions, and information about training.

24. The May 23, 2000 Meeting

The meeting although scheduled for 1:30 p.m., did not begin until 1:55 p.m., because Ellman was speaking to an attorney for Local 810 IBT. Rosaci discussed Kupferberg's April 14 letter, and Ellman provided some of the information requested, including that Respondent paid two hours pay to employees whether or not the employees voted. Ellman told Rosaci that information concerning qualifications and skills for promotions did not exist, and that "we know of no promotions." He answered questions on training and told Rosaci that Respondent was concerned about cost, and down time that might be associated with training. Ellman stated that he needed to leave by 3:30 p.m.

The parties then discussed bulletin boards and the posting of a seniority list. There were several areas of disagreement, which were not resolved. Ellman agreed to post a seniority list, but insisted that the Union or the employees have two weeks to contest the list, or else the right to contest the list is waived. The Union disagreed with this condition, and asserted "that's ridiculous. There is no concern about what's right or correct? It's just the Company that makes the list and stands to gain by any errors." Ellman replied, "that's it."

The Union modified its proposal on recall rights, reducing its period of time for protection from 18 months to 15. Ellman rejected this and adhered to Respondent's position of 2 months. Rosaci changed its proposal on minimum staffing to require

Respondent to employ at least two employees, during the term of the agreement, reducing it from five. Ellman responded that Respondent would not agree to any required minimum work force or required workweek.

The parties then discussed Respondent's hours of work proposal concerning notice of overtime. Rosaci suggested that notice be given before lunch, rather than by the end of lunch as Respondent had proposed. Ellman replied that's not a problem, but there is no obligation on the part of Respondent to give notice and overtime is mandatory. Rosaci replied that they should leave the mandatory overtime issue for now. Ellman said that when overtime work is to be performed, employees so designated would be as conditions warrant give notice before the lunch break. Ellman added that "as conditions warrant", eliminates the need for notice where there are rush orders and time delays. However, Ellman also added, "we condition this on mandatory overtime. There won't be a contract without mandatory overtime."[23] Rosaci responded, "Let's take it one item at a time." It was 3:30 p.m., so the meeting ended. The parties agreed on July 6, 2000 for the next meeting.

By letter dated June 1, 2000, Kupferberg wrote to Ellman and requested a number of items of information, in connection with the Union's efforts to formulate a training proposal.

25. The July 6, 2000 Meeting

Although the meeting was scheduled to begin at 1:30 p.m., Ellman was not there. A staffer from the NYSERB informed Rosaci that Ellman had called, and said he was running late and was caught in traffic. Ellman arrived at 2 p.m., and the meeting began at 2:05 p.m.

Rosaci showed Ellman Kupferberg's June 1, 2000 information request. Ellman said that he didn't receive it, pointing out that he had moved to a different address. Rosaci gave Ellman a copy at the meeting.

Rosaci confirmed Ellman that the Union had a new pension proposal, which was offered through the International and not the Local, and had a low contribution rate, which could easily be adjusted. Ellman asked for copies of 5500 forms and other documents for the new Fund, but added that he wouldn't promise any different reaction.

Rosaci gave Ellman the 5500 reports. Ellman asked several questions about benefit levels, contributions, vesting and other areas, Rosaci answered some of the questions, others he said he would check and get back to Ellman. Ellman insisted that it took 30 years for employees to get a benefit from the plan, and in fact, repeated that assertion more than once to the workers present. Rosaci disagreed, and referred Ellman to the benefits explanation in the package of materials given to him.

The Union withdrew Section 31 (Trust Fund Protection) since it had eliminated its proposal for a Local 455 pension plan. Ellman asked about Section 29 (Adjustment of Rates) and Severance Fund, and Rosaci confirmed that the Union had withdrawn these proposals. Ellman also asked if the Union had withdrawn its proposal for payments into the Union's Health Fund. Rosaci said yes. Ellman was again on the phone.

The Union then modified its vacation proposal, and reduced its weekly entitlement of vacation. Ellman rejected the Union's modified proposal, and said that Respondent did not agree with any change in the benefit.

Rosaci handed Ellman a revised workweek proposal that provides in substance, that a regular workweek shall begin on Monday of each week. Rosaci asked if Respondent had ever worked 5 consecutive days of work that were not Monday through Friday. Ellman did not answer that question, but stated that it won't agree to the Union's language, since we do not believe in restrictions for the future and "we won't agree to language that restricts us." Rosaci responded that "you didn't need it before and you didn't need it in the last year and a half, but you still want the prohibition." Ellman said yes.

The parties discussed the Union's Section 6 proposal on work hours , and Ellman stated that Respondent could agree to a description of the regular work day and work week, but not to start of work on Monday. He added that Respondent would not agree with Sections A–D of the Union's proposal. Rosaci pointed out that Respondent had already agreed to Section B of the proposal as modified by the Union, providing for meeting with the Union to discuss 2nd or 3rd shift terms and conditions. Ellman asked what date and Rosaci told him June 10, 1999. Ellman checked his notes, and replied, "My notes say to negotiate on those shifts, only the rates." Rosaci responded that it was rates and hours. After further discussion, Ellman agreed that, should Respondent start a 2nd or 3rd shift, it would meet and discuss with the Union, pay and hours.

The parties discussed the leave of absence proposal of the Union. Most areas were left unsettled, but the Union did agree that requests for leaves of absence must be in writing. Ellman asked the Union to provide the same Fund documents, which he had asked for previously, for the International Fund. The parties agreed to meet again on August 12, 2000.

By letter dated July 23, 2000, Ellman responded to Kupferberg's June 1, 2000 information request. Essentially, Ellman after making a few comments about the requests, asked the Union to explain the relevance of the information requested.

26. The August 9, 2000 Meeting

Rosaci raised the issue of whether employees who return to work under the Family Medical Leave Act, accrue seniority. Ellman said that seniority did not accrue. Rosaci believed that a returning employee keeps their original date of hire for layoff purposes, but he would research the issue.

After a discussion of a notice posted on workplace searches, Ellman informed Rosaci that he had to leave in an hour.

Rosaci then made a new proposal on wages. It eliminated its demand for bulk payment for retroactive money, and proposed raises of $2.00, $1.00 and $1.00, effective in July of 2000, 2001 and 2002, respectively. He added once again, that the men had not had a wage increase in years, Respondent did not want to pay retroactive money, and this is a way to address the wage gap that had been created. Ellman stated that he would bring up the proposal to Respondent, and have an answer at the next meeting. However, Ellman added that the effective date would be the date the contract is signed and there would be no retroactivity.

[23] Local 157's contract states that any employee shall have the right to refuse to work overtime.

The Union asked if Respondent would consider a health policy other than U.S. Health Care. Ellman replied that he did not care if the Union looked at other plans, but Respondent was interested in cost.

After a discussion of what information Respondent would provide with regard to health care, Rosaci asked if Respondent was awarded Federal contracts greater than $100,000 and the dollar amount of federal contracts over the last three years, that Respondent was either awarded or bid on. Ellman replied that he had not said that his proposal was based on the Act, it wasn't proposed because Respondent is obligated to do it, and that Respondent wants it. Rosaci replied that portions of his proposal is contained in the Act, and if portions that are required by law are necessary for Respondent to get jobs, the Union might change its position more easily.

Ellman asked about the information that he had requested on the new pension plan. Rosaci asked Ellman to put the request in writing. Ellman answered that he had told Rosaci that it was the same as the request that he had made on the other pension plan. Rosaci responded that the other request was a long time ago, to a different Fund, with different administrators, and different Trustees at a different location. Ellman insisted, "Give me the same information". Rosaci added that the information requested was very specific to the other Fund, and again suggested putting the request in writing, reminding Ellman that he had asked the Union to put its requests in writing many times. Ellman responded, "You're not providing the information." Rosaci answered that he had been provided more information than the Union had provided on the other Fund. Ellman replied that if the Union wanted the request in writing, it should have asked for it last time. Rosaci responded, "that's my request now. We need you to detail what you want in writing." Ellman asked if there is anything else? Rosaci replied, that it was 3:00 p.m., and Ellman had to leave. Rosaci added that "we don't have time to discuss it in two minutes, so we'll save it for next time." Rosaci suggested September 12 or 13, 2000, but Ellman was not available. Rosaci suggested September 21, 2002, and Ellman agreed.

By letter dated August 14, 2000, Kupferberg replied to Ellman's July 23 letter, and explained in detail the Union's reasons for seeking the information in its prior request. He explained that the Union was wished to make a specific proposal for effective training for workers with respect to promotions and improved performance in then current positions. Kupferberg then detailed the relevance of each of the items requested, and asked that the information be supplied promptly.

By letter dated August 15, 2000, Kupferberg confirmed requests made by Rosaci at the bargaining session of August 9, 2000, concerning the amounts of Federal contracts awarded to and bid on by Respondent. The letter also explained that the information was relevant to an evaluation by the Union of Respondent's "drug free work place proposal."

Between September 5, 2000 and September 19, 2000, there were a series of letters and phone conversations between Ellman and Rosaci, dealing with Respondent's announcement that it certain employees would have their work week further shortened beginning September 12, 2000, and Rosaci's requests for information concerning this action. After being asked for names of employees affected, Ellman listed 4 names, including "Pedro Cruz" listed as a helper.

Rosaci then requested information about employees in the departments not subject to the reduction, and noted that records previously submitted by Respondent listed David Rumph as a general helper. Ellman replied to this request by noting that David Rumph was a cleaner and not a general helper. Rosaci responded that a September 17, 1999 list provided by Respondent, listed Rumph as a general helper, and that Respondent, contrary to Ellman's assertion, never notified the Union that Rumph's classification had changed. Therefore, Rosaci asked for the date of the change in Rumph's classification and the wage rate paid to him as a result of that change.

Ellman initially replied that the work share application submitted by Respondent in March of 2001 had listed Rumph as a cleaner. He added that in any event, Rumph was not part of the recent reduction in hours. Rosaci responded to this assertion, by pointing out that the work share application referred to by Ellman in his letter, did not list the classification of Rumph or any other employee for that matter. He again asked for the date of Rumph's classification change. Ellman responded by apologizing for the "minor misinformation" with regard to Rumph. Ellman explained that during negotiations, the Union had purposed and Respondent agreed to be more diligent in the cleaning of bathrooms and work areas. To that end, office staff, according to Ellman "mentally re-classified. Rumph, as a cleaner-sweeper, rather than as a general helper, an apparent distinction is without a difference. There has been no change in his wage rate. Should you feel Mr. Rumph should have also been affected by the reduction in hours for the general helper classification, we would certainly consider obliging such a request". Rosaci responded as follows:

> September 19, 2000
>
> This letter is in response to your second letter of September 12, 2000. While we are pleased the Company has committed to cleaning the facility, we are concerned that we were never notified of a classification change. In fact, the discovery of the change only came about as a result of a seriesof inquiries made by us on the subject of a reduced workweek.
>
> Please inform us of anyone else who has had a classification change (as well as the effective date and wage rate paid) and please inform us of any future changes when and if they occur.
>
> Finally, we hope that your remarks on considering reducing Mr. Rumph's work hours is not meant to preclude us from pursuing our inquiries nor meant to deter us from requesting to bargain on the matter.

27. The September 21, 2000 Meeting

Rosaci asked and Ellman informed him that Respondent had no federal contracts over $100,000. Rosaci asked if Respondent submitted bids to the Federal Government. Ellman responded that he didn't know, and it wasn't relevant. Ellman continued to assert that Respondent was not asserting that its proposal is a requirement of federal law. However, Rosaci persisted in inquiring, asking questions such as "are you saying

that in the past three years, there were no federal contracts over $100,000?" Ellman replied that there were no bids presently pending worth over $100,000. Rosaci asked about bids in the past, and whether they were close to $100,000, explaining to Ellman that if the bids were close to $100,000 the last two or three years, there is a good chance that either now or soon, the Union would be more likely to agree to Respondent's proposal. He added that the Union wanted to get more work in the shop. Ellman responded, "have your attorney write me a letter on the relevance of it."

Rosaci asked about the training information. Ellman provided three manuals, and added that Respondent had no written job descriptions. Ellman then verbally want through each job classification and indicated what work was performed by each job and the type of equipment used.

Rosaci asked for a response to the Union's wage proposal. Ellman responded that Respondent rejected it, and would stand on their last offer, stating, "we think what we gave was reasonable." Ellman also rejected the pension plan proposal of the Union, stating, "We don't want to have a pension plan." Rosaci asked, what that meant - no pension plans, not this plan, or concern with another retirement plan or the cost of it. Ellman responded, "just no. We reject your proposal."

The Union then adjusted its proposal on minimum rates to make it consistent with its wage proposal.

After a discussion about references, and the Union's proposal treating employees on "respect", the parties discussed the termination of an employee. The next meeting was scheduled for October 25, 2000.

On October 4, 2000, Kupferberg wrote to Ellman, reminding him that although he had partially responded to the June 1, 2000 information request, he had not responded to items 2, 3, 4, 6 and 8 of such requests.

He also repeated some requests made by Rosaci during negotiations, including information about bids on federal contracts, concerning which Kupferberg explained the relevance.

By letter to Rosaci dated October 23, 2000, Ellman cancelled the October 25, 2000 meeting, because of a "recent scheduling conflict." Ellman offered to reschedule for November 6, 7 or 10, and asked Rosaci to advise if those dates were acceptable or alternative dates.

Rosaci had faxed to Ellman a request to cancel the same meeting, because of his father's death. Subsequently, the parties agreed upon November 28, 2000 for the next meeting.

28. The November 28, 2000 Meeting

Although the Union was there at the scheduled 1:30 p.m. time, Ellman was not. At 2 p.m., a NYSERB receptionist told Rosaci that Ellman had called and said he would be there in 5 minutes. Ellman arrived at 2:10 p.m.

The parties discussed the Union's information requests. Ellman provided some of the information and as to some other requests, stated that Respondent did not have quality requirements or product specifications. Rosaci asked for a list of machinery used and the manufacturer, and some other items. Ellman stated that he would supply the information. Rosaci asked about welding processes, and Ellman made a call to Respondent and obtained the answers to the inquiries.

Rosaci asked why Respondent had rejected the Union pension proposal. Ellman replied that he did not want to give specific reasons other than they don't want to enter into a pension program. Rosaci again asked for the reason. Ellman responded, "There could be 1,000, we reject your proposal." Rosaci persisted, and asked "is it money, is it cost, is it rules, is it not utilized by the employees, … is it any of these." Ellman replied, "for all of those and more."

Ellman told Rosaci that there were no pending bids for government contracts over $100,000, it hasn't bid on any for two years, and it does less than $20,000 a year in government contracts.

Rosaci asked for a description of the Sprayer operation. Ellman called Respondent, and then informed Rosaci that a sprayer is a finisher for wood products, and Luis Lopez is in the position, and was not in the unit.[24]

The Union made a proposal for a Christmas bonus of $100 for each year of service. Ellman replied that he would relate that proposal to Respondent, but added that the general answer is that everything was contingent upon reaching overall agreement.

The parties discussed the Union's proposal that employees be treated with respect and Respondent rejected the proposal primarily because "there was no mutuality."

The parties discussed fieldwork and overtime, and the Union deleted its proposal that prohibited overtime on Saturday.

Rosaci asked Ellman to meet again in December. Ellman replied that he couldn't meet until the second week of January. The parties agreed on January 10, 2001.

29. The January 10, 2001 Meeting

At this meeting, Ellman provided the Union with the machinery list that had been requested. Rosaci asked about a list of which classifications used which supplies that had been requested. Ellman replied that Respondent had faxed it, but it was illegible, so he would send it to the Union. Ellman also provided information on employees, their last day of work and reason for termination.

Ellman informed Rosaci, in answer to an inquiry, with regard to a Christmas Bonus, that all economic issues would be implemented on the effective date of the agreement, and that if a Christmas Bonus was agreed upon, it would be implemented at that time.

Rosaci asked why Ellman rejected Respondent's pension proposal. Ellman responded that he needed the information that the Union had not supplied him, and he mentioned some specific items, such as auditors' projections, reports and withdrawal liability. Rosaci again asked that he put his request in writing, to avoid any discrepancy of what he is asking. Once more Ellman protested that the parties had been doing things verbally. Rosaci once more stated that whenever the Union seeks information, it is requested in writing.

Ellman then was on the phone for a while. When he returned, the parties discussed the Union's Field Fabrication proposal, but no agreement was reached.

[24] This was the first time that Ellman took the position that the position of sprayer was not in the unit.

Rosaci then made a new medical proposal, providing that Respondent pay the entire cost of an HMO Plan, and offered that the Union would drop its demand for early retirement coverage with agreement to this plan. Ellman asked for some information on this plan and Rosaci agreed to provide it.

Rosaci inquired whether nonunit employees were included in the plan proposed by Respondent, wherein employees would be obligated to pay most of the premiums. Ellman responded, "it's not important, you reject it." Rosaci replied that he had not rejected it outright, and would consider all options. He added that high co-pay is difficult to swallow, but inclusion of non-unit people in the plan could cause increased cost to unit employees; i.e. some non-unit people might have large medical bills. Ellman stated that he would find out if other employees were covered, but added that since it is a company plan, this suggests that non-unit people are covered.

The parties discussed the "treat with respect" proposal of the Union, and the Union modified it, to reflect Ellman's previously stated concerns of "mutuality." After some discussion, Ellman said that he would give the Union an answer at the next meeting.

Rosaci then gave Ellman a written proposal on vacancies, openings and promotions to be posted on the bulletin board. Ellman stated that to the extent that the parties reached agreement on a bulletin board, he had no problem posting vacancies, openings and promotions for unit work. However, Ellman rejected curtain provisions in the proposal, such as a second notice to the steward. Ellman took a phone call. Then they resumed discussion of promotions. Rosaci suggested utilizing in house people with years of service, since they are less likely to leave than a new person. Ellman responded that Respondent's philosophy "is not limiting their ability to select."

The parties then briefly discussed reporting pay, and the Union dropped the demand that employees be paid 4 hours pay, if an employee is sent by the Union to the shop after a request by Respondent, and is not put to work.

The parties agreed to meet again on February 21, 2001.

Rosaci wrote to Ellman on January 19, 2001, reminding him that he had still not received information on employee classification and supplies that Ellman had stated at the last meeting had been sent and was illegible, and would be sent shortly.

On January 23, 2001, Rosaci wrote Ellman once again, and mentioned that since the Union was reevaluating Respondent's medical proposal, it needed a number of items of information with regard to its "extant Company plan."

By letter dated January 24, 2001, Rosaci wrote to Ellman, and indicated the specific information with respect to the Union's pension plan that it had provided to Respondent. It adds that after Respondent had rejected this plan on numerous occasions, without providing specific reasons, on January 10, 2001, Ellman verbally requested minutes of the Fund, auditor's reports and projections. Ellman was advised that the Union is not in possession of the additional information requested, that it believes the information is extensive and sufficient, but that if Respondent desirer further information, to contact the National Shopmen's Pension Fund at the address provided.

On January 25, 2001, Ellman responded to the Union's letters of January 19, 23 and 24. He stated that the information with regard to supplies was already supplied orally, and the illegible fax information appears to be the same. Thus, Ellman asked Rosaci to explain in detail why and what information regarding "supplies" the Union is seeking in addition to that previously supplied, since Respondent believes that the information already provided is sufficient.

Ellman also referred to the Union's request for information on the medical plan, and asked for NLRB case law on information relating to non-unit employees. He adds that the Union's request is "suspicious", since the Union had rejected Respondent's proposal for medical coverage with an extensive co-payment. He adds that unless the Union is "prepared to agree to such premium co-pay, what relevance can the additional information requested by you have?" Ellman states however that he has asked the employer, "subject to your position in law", to give him responses only as it relates to nonunit employees.

As to the Union's response to his pension plan request, Ellman stated that he will contact the Fund directly for fund minutes, but asked for updated information on the Fund since the Union's last submission.

By letter dated January 29, 2001, Belle Harper, the Union's attorney replied to Ellman. This letter explained that as to supplies, the Union needed information on job functions and requirements in order to develop a program to train employees. She explained if a classification does not use certain supplies, it would not have to be trained on their proper use. Rosaci advised her that he had explained these reasons to Ellman, and Ellman had agreed to get information, but Rosaci has not received it, and she is at a loss to understand Respondent's reluctance to supply the same.

As to Medical information, the letter explained, that the Union needs to determine benefits liabilities and expected costs of the plan, so it needs to know information with regard to non-unit participants as well. It adds that Rosaci did not ask for individual names to determine that experience.

By letter dated February 5, 2001, Ellman responded to Harper. He stated that Rosaci was given the information requested orally, but he would supply a printed detail of "supply information", at the next negotiation session. Ellman adds however that he is "suspect" of the request for such detail, in that the "party's have not yet agreed in principle to such a training program."

As to the medical plan, Ellman observed that he was an again "suspect" of the request, since the plan was offered by Respondent in 1998, and information was supplied at that time about the plan. He adds that Respondent will supply information at the next meeting as to any increase in premium costs or benefit coverage. He adds that since the Union has continually rejected any co-pay of premium costs, "it appears that such newly requested information is at best premature, and as relates to non-unit employees not relevant." Further, Ellman asks how the "experience information" requested by Harper will enable the Union to make "such determinations", as all benefits, cost and liability information has been provided and will be updated.

Ellman also states that he did request trustee minutes from the Fund, but to date has received no response. He also re-

peated his request made to Rosaci to supply updated information since the Union's first submission with regard to the Fund.

On February 20, 2001, Rosaci called Ellman and cancelled the February 21, 2001 meeting. Over the next few days, telephone calls back and forth between Ellman and Rosaci, resulted in an agreement to meet on March 22, 2001.

On March 1, 2001, Ellman filed a petition in 29–RM–897.

On March 6, 2001, Rosaci spoke with Ellman on the phone. Rosaci asked Ellman to send a list of bargaining unit employees. Ellman agreed to do so. Rosaci asked if the meeting was still on for March 22, 2001, in view of the filing of the petition. Ellman responded by asking Rosaci if he still wanted to meet. Rosaci initially indicated that he would like to think about it. Ellman added he would be willing to meet, "but I'm going to say no to everything." Rosaci then replied, "if we have to meet, we'll meet, yeah, I still want to meet."

By letter dated March 7, 2001, Rosaci wrote Ellman again, requesting a list of current employees. Connie Pezulich forwarded a copy of said list to Rosaci, by fax on March 7, 2001. The list included Lacona as "a general helper", Luis Lopez as a wood finisher", and David Rumph as a "cleaner."

On March 12, 2001, Rosaci sent Ellman SAP reports and 5500 forms and reports for the Fund as Ellman had requested. Rosaci added, "I look forward to seeing you at our negotiating session on March 22."

On March 16, 2001, Rosaci called Ellman to try to work out a stipulation with regard to the RM case to avoid a hearing, which was then scheduled for March 19, 2001. Rosaci told Ellman that he would not be available on March 19, 2001, because he would be involved in negotiations in Maine on that day. Ellman placed a conference call to Lillian Perez, the Board Agent, who was not in, so the parties continued their discussion on Perez's voice mail. The voice mail recording ran out before any agreement was reached. Rosaci then informed Ellman that the parties would work out the details with Belle Harper, the Union's attorney so that neither Rosaci nor Ellman would have to appear on March 19, 2001. There was no discussion about Rosaci's availability on March 22, 2002, or any other date that week, nor any mention of the negotiation session scheduled for March 22, 2001.[25]

Subsequently, as a result of telephone calls between Perez, Harper, and Ellman, the parties agreed to a Stipulated Agreement. The Agreement provided for an election to be held on April 12, 2001 and was signed by the parties and approved by the Director on March 20, 2001. The Excelsior list submitted by Respondent in connection with this election, contained 28 names, including Lacona, Lopez, and Rumph.

On March 22, 2001, Rosaci and the union committee appeared at the NYSERB at the scheduled time of 1:30 p.m., but Ellman did not appear. At 2:20 p.m., Ellman called, after the Union had called his office and left messages. Ellman informed Rosaci that he was in his car and thought that there wasn't going to be a meeting that day. Rosaci asked, "What gave you that idea. I'm here. I sent you a letter saying I would see you here, we had scheduled this." Ellman replied, that he must have misunderstood and he thought that Rosaci had cancelled the meeting. Rosaci asked if Ellman could make it there that day, but Ellman said no, he was too far away to be there. Rosaci asked about rescheduling, and Ellman stated that he couldn't because he was in his car. Rosaci informed Ellman that he would call to reschedule.

On March 26, 2001, Rosaci phoned Ellman, and left a message on Ellman's voice mail to call in order to reschedule the meeting. Ellman never returned Rosaci's call, and made no attempt to reschedule another meeting.

On April 4, 2001, the Union filed the charge alleging in substance surface bargaining, as well as a specific allegation that Respondent violated the Act by cancelling the March 22, 2001 meeting.[26]

On April 10, 2001, Connie Pezulich faxed a letter to Rosaci, reflecting that the "NLRB requested that Chuck Ellman have the following faxed to you." Respondent enclosed information regarding machinery and departments, which had been requested by Kupferberg in his June 1, 2000 letter.

On April 12, 2001, the Region conducted an election in Case No. 29–RM–897, and the ballots were impounded. The Union challenged Lacona's ballot, on the grounds that he performs only woodwork.

By letter dated May 23, 2001, Ellman responded to Rosaci's January 23, 2001 information request, and responded to each of the Union requests dealing with Health Plan coverage. It also included three documents, from the Healthcare carrier to Respondent, dated May 25, 1999, May 25, 2000, and April 17, 2001.

Ellman represented that during the investigation of the instant charges, Board Agent Kate Anderson asked why this previously requested information[27], had not been submitted to the Union as requested. According to Ellman he explained to Anderson that Respondent intended to submit it at the next scheduled meeting, "which was the normal procedure."[28] Ellman asserts that Anderson asked him, notwithstanding this past practice, would he object to sending this information to the Union. He replied no, and consequently asked Respondent to send the April 10 information, and he himself, sent Rosaci the information on May 23, 2001.

The above findings are based primarily on the credited testimony of Rosaci, which is supported by his detailed contemporaneous notes of the bargaining sessions, as well as in part by the testimony of employee Reinaldo Rivera. Ellman testified on behalf of Respondent, and for the most part did not dispute the testimony of Rosaci. To the extent that the record revealed

[25] In fact, Rosaci had previously discussed with the Union's attorney, Belle Harper that he would be available for a Board Hearing on March 22, 2001 in the morning, since he had negotiations scheduled for the afternoon of March 22, 2001. However, Harper indicated that she could not postpone the hearing to March 22, 2001, since she already had received a postponement from March 12 to March 19, 2001. This conversation was not communicated to Ellman, however.

[26] Subsequently, on June 11, 2001, the Union requested withdrawal of that portion of the charge alleging that Respondent violated the Act by failing to appear on March 22, 2001.

[27] This included the included information submitted by Respondent on April 10, 2001, as well as May 23, 2001.

[28] I note that Rosaci vigorously disputes that this was the "normal procedure", and notes that many of the Union's requests were complied with in writing, and not given at bargaining sessions.

a few differences in their testimony,[29] I have credited Rosaci's version of events, since I found him to be a more believable and credible witness.

Ellman also provided testimony concerning Respondent's bargaining strategy and its requests for information from the Union. In this regard, Ellman testified that the parties were bargaining for a new contract, and that the Union was not seeking to modify the Local 157 contract, which had been in existence 5 years earlier. The parties started from page one of the Union's proposal, discussed various items therein, as well as discussing Respondent's counter proposal that it submitted. He noted that initially the Union sought to expand the certification and it took several months and a CB charge filed by Respondent to persuade the Union to agree to the Board certification language.

Ellman also noted that he informed the Union that many companies in the industry had gone out of business, and that those that continued in business including Respondent's competition, purchased most of their product pre-manufactured overseas.

Ellman also testified that after the Union proposed that Respondent participate in various Funds, the Union either delayed or refused to supply it with information with regard to the Funds, particularly the minutes. He explained that Respondent needed this information, in order to decide on whether to contribute to these Funds. He adds that Respondent never received the minutes, even though the Union's President, William Calavito, was a Trustee of all the Funds and easily could have obtained that information.

Eventually, Respondent rejected participation in any pension fund proposed by the Union, because by that time, according to Ellman, whether or not it received the information, it had decided to put the money it was prepared to offer into wages and healthcare and other economics, such as holidays, vacations and sick days.

Ellman also testified that in answer to a question by Rosaci, he responded that he wasn't going to claim that the parties were at impasse. However, Ellman added that he told Rosaci that Respondent would bargain with the Union "until the cows come home", but they "were not going to get the kind of contract that they were proposing." He also stated that Respondent was willing to enter into a contract which contained what "we deemed to be reasonable proposals for a contract, but not agree to the type of contract they were agreeing to."

Ellman also attempted to explain the absence of Connie Pezulich at meetings. He asserts that the beginning of Pezulich's non-attendance, it was because of other commitments that popped up after the negotiations had been scheduled.[30] Thereafter, according to Ellman it because apparent that the Union was intent on a contract that included significant operational restrictions and economic increases that would make Respondent not competitive in the industry. Therefore, Pezulich indicated to Ellman what she would agree to in a contract, that would give Respondent, "the freedom to operate the facility as it had been operating over the past number of years," and the economic increases that she would agree to. She informed to Ellman to continue the meetings without her.

Ellman also noted that after the Union had made its demand for a safety inspection, Respondent agreed, and that as a result of that report, spent over $30,000 to remedy the problems disclosed by the report. According to Ellman, this $30,000 that Respondent spent on these repairs, reduced the amount of money available to spend on economic improvements in a new contract.

Ellman also provided some testimony with regard to the Union's information requests. With respect to the information request concerning training, he testified that Respondent repeatedly asserted that there was no relevance to this information, dealing with curricula for such a program, since the parties had not yet reached an agreement on whether to have a training program at all. Eventually, Ellman asserts that although he believed that the information was irrelevant, because it was "premature," he decided to turn over the information to the Union.

Ellman also explained Respondent's decision not to participate in the work share program. He conceded that Respondent initially agreed when the idea was presented by the Union, and in fact filled out an application. However, Ellman asserts that Respondent found out from the Department of Labor (D0L) that there could be costs to Respondent associated with the plan. Therefore, Ellman, himself called a representative of the DOL and ascertained that indeed there could be costs associated with the plan, since it was not as Respondent believed, a grant, but a form of Unemployment Insurance, that could result in a raise of Respondent's rates. Moreover, the representative could not inform Ellman of how much the costs could be to Respondent. Thus, based on that development Respondent decided not to participate in the program and so informed the Agency and the Union.

Ellman also testified that Respondent received documented evidence that the Union had lost its majority status. He claims that he presented the options to Respondent, which included the option of withdrawing recognition. Respondent decided that withdrawing recognition would only prompt additional unfair labor practice charges, so it decided instead to file an RM petition and allow employees to vote on whether they wished to continue to be represented by the Union.

Ellman also testified to his version of the conversion with Rosaci on March 22, 2001, concerning which as I have noted above, I credited Rosaci. Ellman also testified that the reason that he did not appear for the March 22, 2001 meeting, was that he had thought based on his prior conversation with Rosaci in mid March 2001, that Rosaci would not be available on March

[29] For example, Ellman asserted that Respondent offered a 15 cent per hour raise and then raised that offer to 25 cents. However, I credit Rosaci that Respondent made only one wage offer, that of 25 cents per hour. There is also some discrepancy in their testimony concerning their conversations in March of 2001, and how negotiations ended. I have credited as related above, Rosaci's version of the conversations, including the fact that he called Ellman after Ellman did not appear at the March 22, 2001 meeting, left a message for Ellman to call and reschedule a meeting, and that Ellman did not return his call or otherwise attempt to schedule a meeting thereafter.

[30] Ellman did not detail what these commitments were that had allegedly "popped up" after negotiations had been scheduled.

22, 2001 because of negotiations elsewhere. Ellman also testified that after the March 22, 2001 conversation, Rosaci never made any request for resumption of negotiations. However, as I have noted above, I credited Rosaci that he did the day after the conversation, telephone Ellman and left a message to call him regarding resumption of negotiations and that Ellman never returned his call. Notably, Ellman did not deny that he received such a call or explain why he did not return Rosaci's call after the March 22, 2001 meeting, did not take place.

III. THE INFORMATION REQUESTS

It is well settled that when a Union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information was not furnished. *Beverly California Corp*., 326 NLRB 153, 157 (1998); *Capital Steel & Iron*, 317 NLRB 809, 813 (1995); *Bryant & Stratton Institute*, 321 NLRB 1007, 1044, (1996), enfd 140 F.3d 169 (2d Cir. 1998); *Quality Engineers Products*, 267 NLRB 593, 598 (1983). Further, belated compliance by an employer, after an unfair labor practice charge is filed, does not retroactively cure the unlawful refusal to supply the information. *Beverly California*, supra*; Interstate Food Processing Corp.*, 283 NLRB 303, 306 (1987); *Postal Service*, 276 NLRB 1282, 1288 (1985).

In assessing Respondent's conduct in light of this precedent, I have considered Respondent's conduct both inside and outside the 10(b) period. However, although I make no order or formal finding with respect to the pre10(b) conduct, it is appropriate to evaluate Respondent's alleged refusals to supply information, as well as other conduct both at the bargaining table and outside it, to elucidate the nature of Respondent's conduct inside the 10(b) period. *Tennessee Construction Co*., 308 NLRB 763 Fn. 2 (1992). *John Hutton Co*., 213 NLRB 85 190-92 (1974).

With respect to the pre-10(b) period, the Union on November 13, 1998, requested in writing that Respondent supply it with Material Safety Data Sheets, as well as information concerning disability and workmen's compensation claims. These requests were ignored by Respondent, and Rosaci renewed them orally at the meeting of December 17, 1998. With respect the material safety data, Ellman responded that "they were working on it." As to the Union's request for disability and workmen's compensation information, Ellman questioned the relevance of this information, and asserted that he had problems with disclosing confidential medical records of employees. He suggested that the Union obtain signed releases from employees before medical records can be turned over.

Rosaci replied that disability claims may contain work related injuries that get claimed as disability rather than compensation. Rosaci wanted the information to see what is happening with regard to safety issues, and added that he was not interested in names, and told Ellman to delete names if the wished.

On December 21, 1998, Kupferberg wrote to Ellman, and reiterated the relevance of the information requested by the Union and explained by Rosaci. Kupferberg stated that the information is relevant to possible health and safety problems in the shop, as well as potentially, to a discussion of health insurance. With respect to Ellman's objection on grounds of employee privacy, Kupferberg stated that the Union would agree to redaction of identifying information, such as age, date of hire and even date of disability. Kupferberg also repeated for the third time the Union's request for Material Data Sheets.

On December 29, 1998, Ellman wrote to Kupferberg and enclosed the Material Data Sheets requested by the Union. As to the disability and workers compensation information, Ellman continued to insist on a release from affected employees. He stated that although Kupferberg had suggested redacting identifying information such as age, date of hire and date of disability, such redacting did not include the effected individuals name.[31]

The above evidence reveals in my judgment the start of a consistent pattern that Respondent frequently utilized in responding to many of the Union's information requests. Ellman would make objections to the relevance of the information, and at times, the objections would be spurious. Then after the Union explained the relevance of the information, and was forced to make several additional requests for the information, Respondent would eventually comply.

By letter dated January 28, 1999, Ellman responded to the Union's request concerning disability insurance. He indicated that there was only one disability claim in the last 5 years, on October 1996, medical condition was unknown, and the claimant died. Further, by this time, significant amounts of time had passed between the request and Respondent's compliance, and Respondent offered no explanations for its delay.

Thus with respect to the disability information requested by the Union, Ellman questioned the relevance of same, although both Rosaci and Kupferberg clearly explained that such information is relevant to the Union's safety concerns, as well as, potentially in health insurance issues. I find there is no doubt that such information is relevant to the negotiations. While Ellman did the raise, a concern about employee privacy as to medical records, Rosaci immediately accommodated that concern by offering to redact the employees' names. *United States Testing Co*., 324 NLRB 854, 859 (1997), enfd. 160 F.3d 14 D.C. Cir. 1998). Further Respondent has adduced no evidence as why it delayed furnishing this information for 5 months after the request. Insofar as it might argue that it had concerns about confidentially, I conclude that these concerns were adequately accommodated by Rosaci's offer to have the names redacted. Therefore, I conclude that Respondent's delay in supplying this information was not adequately explained or justified and was unlawful. *Beverly California*, supra, (delay of 2 months); *Quality Engineers*, supra, (2 month delay); *Interstate Food* (5-month delay).

As for the Material Data Sheets requested by the Union, Respondent never questioned the relevance of this information, but it still took several requests by the Union and 1-1/2 months before this information was supplied. Although Ellman when asked about this information by Rosaci, responded by stating that Respondent was "working on it", no more specific information was provided. In the absence of any testimony from Respondent, such as when it started to compile this informa-

[31] However, Ellman ignored the fact that Rosaci had offered to redact the name of the employee at the previous session.

tion, what was involved in compiling this information, how long it took, or any other facts explaining the delay, I conclude that Respondent has not adequately explained the delay, and again violated its duty to supply information to the Union in a timely fashion. *Capital Steel & Insurance Co.*, 317 NLRB 809, 813 (1995) (delay of 2 weeks found to be unreasonable).

General Counsel also points to Respondent's conduct with regard to the request for inspection of the premises to have been another instance of an delay, since the request was made on November 13, 1998, and was not granted until February 24, 1999, when the inspection took place. I disagree. Here, Respondent agreed early on to the concept of an inspection, and the parties spent several months bargaining back and forth over the details of the inspection. I find no bad faith by Respondent with respect to this issue, nor unreasonable delay in agreeing to the Union's inspection request.

On April 13, 1999, the Union wrote a letter requesting several items of information, including information concerning subcontracting of certain work, a breakdown by task, and Respondent's reasons for subcontracting, copies of warning letters issued for certain infractions, lists of workers paid minimum wage, those who received merit increases, worker paid for personal days, dates of advance notice given, employees denied personal days for failing to give advance notice; Respondent's current policy on advance notice for sick and personal days, as well as any waiting period for new employees to receive this benefit.

Ellman responded to this request on April 23, 1999. He answered the Union's request 1(a) dealing with press or shear tasks, but asserted that Respondent did not keep records regarding a breakdown by task of work contracted out, and in any event questioned the relevance of that information. He also stated that Respondent had previously responded to the request for reasons for subcontracting at the last negotiation session.

In the latter regard, in fact at the March 31, 1999 meeting, Ellman did not answer Rosaci's request for a reason why it subcontracted certain work. His only response was "because we chose to." However, at the prior meeting, March 11, 1999, Ellman did respond to Rosaci's inquiry concerning why it subcontracted in general and why it wanted no prohibition on such action. He informed Rosaci, after Rosaci pressed him, that among other reasons, it was because it was faster, cheaper and more efficient to subcontract work. With respect to the Union's remaining requests for information on April 13, 1999, Ellman requested the Union to explain the relevance of such information to the Union's negotiations.

By letter dated May 20, 1999, Kupferberg explained the relevance of the information requested by the Union. He explained that the breakdown of work contracted out would assist the Union formulating contract proposal by enabling it to determine importance of contracting out to Respondent, a well as to measure the degree of union flexibility.

He also explained the need for information on merit raises, warning letters, and other personnel policies of Respondent. On August 9, 1999, Kupferberg in a letter to Ellman, reminded him that the information concerning these items, which he had explained the relevance of on May 20, 1999, and which were requested on April 13, 1999, still had not been provided.

Finally, at the negotiation session of September 23, 1999, Ellman furnished to Rosaci several items of information, including the information requested on warning notices. He also informed Rosaci that Respondent had no records reflecting the number of hours subcontracted, and gave the Union some figures on types of work subcontracted and or purchased as premanufactured components. Rosaci asked again for reasons, Ellman responded "it could be rush orders, large orders, cheaper." Ellman also informed Rosaci about merit increases given and taken away, and Respondent's policy on notice for personal or sick days.

Ellman did not provide the Union with its requested information with regard to employees paid the federal minimum wage over the last three years at this meeting. This information was provided, however, at the session of October 20, 1999, after Kupferberg had to make another request for this information by letter of September 27, 1999, and after Rosaci made two oral requests for this information at the September 23, 1999 and October 20, 1999 meetings. The list given to Rosaci at that time included five names and dates that they were paid the minimum wage.

Once again the above evidence reveals additional instances of Respondent delaying the providing of relevant information, without an adequate explanation. The information requested on April 13, 1999, concerning merit increases, warning letters, workers paid, the Federal minimum wage, and information concerning Respondent's policies and past practices concerning sick leave, personal leave and advance notice, are clearly relevant to the negotiations. I find that Respondent's insistence that the Union detail the relevance in Ellman's April 23, 1999 letter to be spurious and made for the purpose of delay, since in my view, Ellman, an experienced negotiator could not have entertained any serious doubt about the relevance of this information. Further, even after the relevance was explained by Kupferberg, in his letter of May 20, 1999, Respondent still failed to furnish some of this information until September 23, 1999,[32] and the rest until October 9, 1999, a delay of 5 and 6 months from the date of the request. Once more Respondent has failed to provide any explanation for this inordinate delay, and has once more violated its obligation to supply information to the Union in a timely fashion. *Beverly California*, supra; *Interstate Food*, supra; *Quality Engineered*,supra.

With respect to subcontracting information, I do not find an improper delay, concerning Respondent's reasons for subcontracting, since Ellman had, as he indicated given such reasons to the Union at prior sessions. However, Ellman informed the Union on September 23, 1999 (as he had stated previously) that Respondent had no records reflecting the number of hours or dollar amounts of subcontracted work. Ellman did provide to

[32] Notable in this connection is the June 24, 1999 meeting, wherein Rosaci asked about the information concerning minimum rates. Ellman replied that even if the Union is entitled to the information, it can't make a difference, because Respondent would not agree to a contract with more than the federal minimum wage. Rosaci replied that the Union needed tools to develop argument and proposals. Ellman replied "you don't need tools, you know our position." Thus, Ellman espoused a clearly spurious position that information would not be turned over because Respondent had a firm stance on the issue.

the Union, at that time, oral information concerning the type of work subcontracted, as well as some figures for each of these types of work, such as $50,000 for polishing. Since Respondent provided no explanation, why it could not have provided this information, sooner than 5 months after it was requested, I again find that it inordinately delayed supplying this information as well.[33]

At the negotiation meeting of June 24, 1999, Rosaci orally requested information concerning past chemical spills including logs on this subject. This request was also ignored by Respondent, and was repeated in writing by Kupferberg's letters July 16, 1999 and August 9, 1999.

Finally, at the meeting of August 23, 1999, after Rosaci had to make another oral request for this information, Ellman replied that there were none to his knowledge. Thus, for a simple answer that there were no chemical spills at the factory, the Union was required to make 4 requests over a 2-month period. Again, Respondent has offered no explanation for this clearly unreasonable delay in obtaining this simple information. Thus, it has again violated its obligation to supply timely information to the Union. *Capitol Steel*, supra.

At the August 23, 1999 meeting, Rosaci asked Ellman for information on loans and the amounts of loans to employees by Respondent. Ellman initially responded that Respondent would not provide that information because it is private, and told Rosaci to make a proposal on loans, and he would consider it. Kupferberg by letter of September 1, 1999, repeated this request, asserting that, "availability of employee loans is a term or condition of employment."

At the meeting of September 23, 1999, Ellman informed Rosaci that there were no outstanding loans and there was no policy, it was handled on a case-by-case basis. Rosaci replied that this information was incomplete, since the Union was not provided information on loans, amounts and dates. Ellman replied that Respondent doesn't have records and does not remember. Rosaci questioned this assertion, and asked how Respondent kept track of the loans. Ellman conceded that these were some payroll deductions. Kupferberg repeated this request in writing by letter of September 27, 1999. At the next meeting, October 20, 1999, Rosaci again requested information about loans, and Ellman gave him a list of employees who had received loans along with the amounts, dates and a weekly repay schedule.

Once more Respondent has repeated its pattern of initially making spurious and frivolous objections to a clearly relevant request, and then finally supplying the information only after repeated requests by Respondent after an unreasonable amount of time had expired. Thus, initially Ellman refused Rosaci's requests, asserting that the issue was "private". This is again a spurious response, since a loan to employees is clearly a term and condition of employment, as Ellman was well aware. Ellman's further response to Rosaci's demand for records was misleading, if not false, when he asserted that Respondent had no records, when it obviously did. Finally, after several requests, Respondent produced the requested information, two months after the request, without supplying any explanation for the delay. Based on the above circumstances, Respondent has once more violated its obligation to supply information to the Union in a timely fashion.

The above findings dealing with Respondent's refusal to supply information in a timely fashion all are outside the 10(b) period, and as noted cannot be found to constitute a violation of Act or result in a recommended order. However as also related below, these are relevant to an assessment of Respondent's conduct within the 10(b) period, with respect to both Respondent's continued failure to produce information in a timely fashion, and to Respondent's alleged bad-faith bargaining.

The complaint does allege several specific violations of the Act dealing with information requests and unreasonable delays in furnishing same, within the 10(b) period. In that regard, the Complaint alleges that the Union made requests for information on various dates between June 1, 2001 and January 23, 2001, and that Respondent on or about November 28, 2000, April 10, 2001, and May 23, 2001, dates within the 6-month period, provided the information requested, but the length of time from the dates of the information requests to the dates when said information was provided, constitutes a delay in furnishing the Union requested information.

Respondent has raised Section 10(b) as a defense to any events occurring outside the 10(b) period. Thus, the issue is raised as to when the 10(b) period begins to run. In this regard, the 6-month statute of limitations period begins to run when a party has "clear and unequivocal" notice of a violation. Here's the facts disclosed that the Union was never put on notice outside or indeed even inside the 10(b) period that Respondent wouldn't comply with the information requests involved. *Public Service Electric & Gas*, 323 NLRB 1182, 1188 (1997). Indeed the complaint admits and the evidence reveals, that Respondent did eventually submit all the information requested, and that these submissions all occurred within the 10(b) period. Therefore, these allegations are not time barred, *Public Service* supra, see also *Shaw's Supermarkets*, 337 NLRB 499, JD fn. 1 (2002).

Turning to the merits of these incidents, the record reveals that at the August 4, 2000 meeting, the parties were discussing Respondent's proposal for drug testing. Rosaci asked if Respondent was awarded federal contracts greater than $100,000 and other information regarding federal contracts. Ellman responded that Respondent's proposal was not based on the Drug Free Workplace Act, and did not propose it because it is obligated to do so. Rosaci explained that portions of Respondent's proposal are contained in the Act, and that if portions of that refusal by law are necessary for Respondent to get jobs, the Union would change its position more easily. Ellman would not supply the information.

The Union repeated its request in writing, dated August 15, 2000, wherein Kupferberg explained that the information would assist the Union in its evaluation of Respondent's "drug free workplace" proposal, inasmuch as there may be more of a

[33] It is also significant that at the June 24, 1999 session, Ellman informed Rosaci that the Union's information request on subcontracting was not relevant, because there won't be any contract with any limitations on subcontracting. Once again Respondent has espoused a frivolous position that because Respondent is adamant about not agreeing to any limit on subcontracting, that the information is not relevant.

reason for such a proposal if it might be necessary to secure federal contracts.

At the September 21, 2000 meeting, Rosaci asked about federal law. Rosaci asked if there were any bids pending over $100,000. Ellman replied no. Rosaci persisted and asked about the amounts of such bids over the past three years, because if bids were close to $100,000, it would be more likely that the Union would agree to Respondents proposal to get more work in the shop. Ellman responded, "have your attorney write me a letter on the relevance of it."

Consequently, Kupferberg on October 4, 2000, wrote to Ellman, explaining the relevance, essentially repeating what Rosaci stated at the meeting, and what Kuperberg had said in his prior letter, i.e. "to the extent that the Employer is or may draw close to the $100,000 threshold such a proposal may be more reasonable and or less of an otherwise unexpected burden".

Finally, at the November 28, 2000 meeting, and after Rosaci had to ask about the issue, Ellman disclosed to the Union that Respondent had no government contracts for the last 2 years, and do less than $20,000 a year in government contracts.

Thus, the above evidence establishes that Respondent engaged in similar unlawful conduct with regard to a clearly relevant information request by the Union. It protested the relevance with a questionable, at best reason, that its proposal was not based on the Federal Act. Rosaci immediately explained to Ellman that portions of its proposal were contained in the Act, and if Respondent was subject to or close to the requirements of the Act, the Union would be more likely to agree to the proposal to get more work into the shop. This rather obvious explanation, should have satisfied Respondent, but Ellman continued to question the relevance of the information, demanded that the Union put its explanation in writing, and then finally provided the information, after the Union's attorney twice explained the relevance in writing essentially giving the same explanation provided by Rosaci on August 9, 2000, and at subsequent meetings. Respondent finally provided the information on November 28, 2000, over 3 ½ months from the date of the request. Again, Respondent provided no explanation for the delay. I find once more that its continued requests for explanation of relevance were not made in good faith, since relevance had clearly been explained to Respondent by Rosaci and Kupferberg.

Accordingly, I conclude that Respondent by waiting over 3-1/2 months to supply this information, has violated its obligation to submit timely information to the Union in violation of Section 8(a)(1) and (5) of the Act. *Beverly California*, supra; *Bryant & Stratton*, supra; *Capital Stee,l* supra; *Interstate Food*, supra.

On June 1, 2000, the Union made an information request concerning a training proposal to be formulated by the Union. Ellman responded by letter of July 23, 2000, demanding to know the relevance of each item requested by the Union Kupferberg replied by letter of August 14, 2000, detailing the relevance of each item requested. At the September 21, 2000 meeting, Rosaci asked about the Union's information request on Training. Ellman replied that some of the Union's requests were relevant, but did not specify which items they were. However, he did supply information concerning three of the Union's eight requests. He provided three manuals, in response to the Union's requests for operating manuals used by bargaining unit employees. He responded to the Union's requests for job duties and equipment used by each classification, by stating that Respondent did not have written job descriptions. However, Ellman did orally inform the Union what work each job title performed and what equipment they use.

Kupferberg wrote to Ellman on October 4, 2000, reminding him that although he had responded to three of the Union's requests for training information at the prior meetings, he did not respond to the other five items in the June 1, 2000 letter, a copy of which was enclosed.

At the meeting of November 28, 2000, Rosaci asked for the remaining items from the Union's June 1, 2000 request. Ellman informed Rosaci that Respondent does not have any product specifications, and no quality requirements (Items 2 and 3 of the Union's request). He gave Rosaci a copy of Respondent's product catalog (Request No. 4). With respect to item

No. 8 memos concerning employees quality or quantity of work, (Item 8), Ellman replied that Respondent could not find any. Rosaci asked about Item 7, the Union's request for supplies used by bargaining unit employees. Ellman answered that he would get that information for the Union, but did say when, nor explain why it had not provided it sooner.

Kupferberg, by letter of November 29, 2000, confirmed that Ellman had agreed at the November 28, 2000 meeting, to provide information "concerning which work groups or classifications use which supplies."

On January 10, 2001, Rosaci asked Ellman for this information, which he had promised. Ellman replied that Respondent had faxed the information to him, but the list was illegible, but he would send the information to Rosaci.

On January 19, 2001, Rosaci sent a letter to Ellman reminding him of his promise at the January 15, 2001 meeting to submit this information as soon as he cleared up the poor quality of the transmission from Respondent.

Respondent responded by letter of January 25, 2001. Ellman asserted that Respondent had orally supplied information to the Union concerning this issue, and that the fax from Respondent contained essentially the same information. He asked the Union to explain in detail what information regarding supplies it is seeking in addition to that previously supplied, "as we believe the information previously supplied, is extensive and sufficient."

Union Attorney, Harper responded, immediately. He noted that the Union needed to know job functions and replacements, and which classifications use which supplies, so that the Union would know which classifications need training on proper usage. She added that Rosaci had previously explained the reason for this request, and that Ellman had agreed to supply this information. She added that previous information supplied, as to what supplies are used generally, does not answer the Union's questions, and that the Union is at a loss to understand Respondent's "reluctance to give the simple information requested."

Ellman replied to Harper, by letter February 5, 2001, in which he stated again that the information requested was supplied orally, but that in any event it was his intention to give a

printed detail of the "supply" information at the next meeting. Ellman adds that he is "suspect of the request for such detail on the premise of developing the specifics of a contractually required training program, in that the party's have not yet agreed in principal to such a "training program."

As noted above, the March 22, 200l meeting was not held, as scheduled because Ellman did not appear, claiming that he misunderstood and thought that the meeting had been cancelled, because of Rosaci's negotiation commitments out of State. Nonetheless, no new meeting was thereafter scheduled, although Rosaci had left a message with Ellman requesting that Ellman call to reschedule. Ellman did not call, and the Union filed the instant charge on April 4, 2001.

Thereafter, on April 10, 2001, Pezulich forwarded to Rosaci a response to the Union's request for a list of supplies used by each job classification. In this regard Ellman represented that during the investigation of the charge, he informed the Board Agent that Respondent had intended to submit this information at the next bargaining session, and that she asked Ellman to transmit it to the Union, which he did at that time.

Ellman also testified that during the negotiations, he repeatedly told the Union that it was "premature" to request training information, relevant to curricula for such a program, since the parties had not yet reached agreement on whether to have a training program at all. I credit Ellman's testimony in this regard, since it was not denied by Rosaci, and is consistent with his letter to the Union's attorney.

Once again the above facts demonstrate further instances of Respondent unduly delaying the submission of relevant information to the Union. With respect to this issue, Respondent argues, as it did during negotiations, that information regarding training curriculum, was premature and therefore not relevant, since the parties had not yet agreed on whether to have a training program in the contract. This contention is wholly without merit, and again borders on being frivolous. The information sought is clearly relevant to the issue of training, and there is simply no arguable basis for Respondent to assert that the parties must agree to have a training program first, before submitting information concerning the details of such a program. Indeed that argument could be made with respect to any issue, and would severely hamper the Union's ability to make proposals. In sum, it is not appropriate for Respondent to in effect bifurcate an issue, by saying first we must agree on having a particular item in the contract, and then bargain about and supply information concerning the details of the item. As long as the information requested is relevant to an issue, it must be supplied in a timely fashion to the Union, not when Respondent believes it is an appropriate point in bargaining on that issue.

Once more, the evidence reveals that Respondent unduly "dragged its feet", it supplying this information to the Union. The information was requested on June 1, 2001. Respondent did not supply any of it until September 21, 2000, when it supplied part of it. At that point, once more Respondent had again made a spurious request for an explanation of relevance, and even that request took seven (7) weeks to be made, without any explanation for the delay. I therefore conclude that the 3-month delay in supplying this relevant information was not explained nor justified and is unlawful. *Beverly California*, supra; *Capitol Steel*, supra.

Similarly, the rest of the information requested was not supplied until November 28, 2000, and with respect to the information on supplies, not until April 10, 2001. Thus, this information took 6 and 10 months respectively to be supplied, and is similarly unlawful. Once again Respondent supplied no adequate explanation for the delay. While it did attempt to explain the delay is submitting the supplies information, I find Ellman's testimony unpersuasive. Even accepting Ellman's assertion that Respondent intended to submit the information to the Union, on the March 22, 2001 meeting, which was cancelled, that would not justify the long delay. Thus even accepting that date, it would be 9 months from the request, without an adequate explanation, and once more, a delay caused in part by Respondent's insistence on what I have found to be a spurious assertion that the request was premature.

Accordingly, I conclude that Respondent has further violated Section 8(a)(1) and (5) of the Act by failing to supply training information requested by the Union on June 1, 2000, in a timely fashion.

Finally, on January 23, 2001, the Union requested in writing that the Union supply it with various items of information dealing with healthcare issues. Rosaci had at the prior meeting, asked whether non-unit employees are included in the plan that Respondent was proposing, and had requested employees to pay most of the premiums. Ellman replied that it is not important, since the Union had rejected the proposal. Rosaci replied that the Union had not rejected it outright, but has to consider all options, but since there is a high co-pay, the inclusion of non-unit people may result in increased cost for the Union's people. Ellman replied that he would find out.

Ellman wrote to Rosaci on January 25, 2001. In reference to the January 23, 2001 request, he asked for NLRB case law to support the Union's request for information relating to non-unit employees, as well as the need for each inquiry. He added that he felt that the Union's request was specious, since "unless you are prepared to agree to such premium co-pay, what relevance can the additional information requested by you have." Ellman concludes by stating that he asked Respondent to give him responses only as to unit employees.

Harper responded on January 29, 2001, explaining that past experience and utilization of the plan is clearly relevant, as Rosaci explained previously to Ellman, and that since the experience may have covered non-unit employees, the Union needs the information to help determine costs.

Ellman replied on February 5, 2001, again asserting that he is "a suspect of the request", since the Union has had the same plan under review since 1998, and that the Union has continually rejected any co-pay of premiums. Therefore the request is "at best premature, and as it relates to non-unit employees not relevant." However, Ellman did assert that Respondent will be prepared to provide the Union at the next meeting, information relating to increases in premiums or changes in benefits or liabilities.

As noted above, the February 21, 2001 meeting was cancelled and rescheduled to March 22, 2001. As also related above, on March 6, 2001, Rosaci and Ellman had a conversa-

tion, after the RM petition was filed, in which they discussed whether the parties would continue to meet, notwithstanding the petition. Ellman agreed to meet, if Rosaci wanted, but added "I'm going to say no to everything." Rosaci informed Ellman that he still wished to meet, and confirmed in a March 7, 2001 letter requesting additional information, "I look forward to seeing you at our negotiating session on March 22."

As also detailed above, Ellman did not appear at the March 22, 2001, meeting, claiming that he believed that Rosaci had cancelled the meeting, since the NLRB hearing for March 19, 2001 was cancelled, due to Rosaci's negotiation schedule. Nonetheless, as also found above, Rosaci called Ellman on March 26, 2001 left a voice mail message that Ellman should call and reschedule a meeting. Ellman never returned the call, nor made any attempt to reschedule a meeting.

The Union filed its charge on April 4, 2001 and on May 23, 2001, Ellman finally responded to the Union's January 23, 2001 information request. He enclosed three documents; (1) a letter dated May 25, 1999 from Aetna to Respondent, detailing Respondent's monthly rates beginning July 15, 1999,[34] (2) a letter from Aetna to Respondent dated May 25, 2000, which set forth the rates starting July 15, 2000,[35] and (3) a letter dated April 17, 2001 from Aetna, which was in reply to a letter from Connie, and which confirms a prior conversation with Respondent's bookkeeper in February that Aetna does not release claim experience or individual large claim information. The letter also included rates for individuals on COBRA. Ellman's letter responded to all of the Union's requests, and referred to the three attached documents to answer many of the Union's inquiries.

Ellman represented, as he had in connection with the training information discussed above that Respondent intended to submit the information requested in the January 23, 2001 letter, at the next negotiation session, which never took place. Further, Ellman asserts that he eventually, submitted the same in May, 2001, at the suggestion of the Board Agent.

As to the relevance of the information, Respondent argues, as it did during negotiations, and in its response to the Union, that to the extent that the information requested seeks private medical information concerning non-unit employees, it is irrelevant. I disagree. In *U.S. Testing*, supra, the precise issue under consideration was presented. The Union sought information on claims filed by non-unit employees covered by the employee's plan, where as here, the employer was seeking to require workers to pay a portion of the premium. There, the amount requested by the Employer was 39 percent, as apposed to 80 percent here, and the ALJ found, affirmed by the Board, that this information was clearly relevant. Thus, although the information relates to non-unit employees, the Union has established the relevance, since it is entitled to examine the difference in claim experience between unit and nonunit employees, since they are part of the same plan. *Langston Cos.*, 304 NLRB 1022, 1071, (1991) (Board upheld union's request for information concerning "corporate wide policy", which relates to unit and non-unit employees). Therefore, the formulation on costs and claims is therefore relevant to the Union's formulation of proposals to submit to Respondent. *U.S. Testing*, supra, *Martin Marietta Engineers Systems*, 316 NLRB 868, 874 (1995).

Having established the relevance of the requested information, I turn to the issue of whether Respondent has provided an adequate explanation, for its failure to produce such information until four months after the request. I conclude that Respondent had once again failed to adequately explain its unreasonable delay.

I note once more, Respondent's initial position, as expressed in Ellman's February 5, 2001 response, that the request was "premature," since the Union had continually rejected any copay of premiums. This is but another in the long line of frivolous positions taken by Respondent in response to clearly relevant information requests. Thus, whatever the Union's current position was, the information might persuade the Union to change or modify that position. Therefore, there is no arguable basis for Respondent to deem the request "premature" or not relevant. Nonetheless, in the very same letter, Ellman did state that notwithstanding this position, it would turn over information, as it relates to unit employees at the next meeting. This is Respondent's explanation for waiting four months to turn the information over sooner. I find this explanation inadequate, under the circumstances herein. At the time that Respondent made this offer, (February 5, 2001), the next meeting was scheduled for February 21, 2001, so if that meeting was held as scheduled, and the information turned over, Respondent's explanation might have been reasonable. But that meeting was cancelled, as was the rescheduled March 22, 2001 meeting. Yet, although Respondent had all of the information with respect to unit employees in its possession (letters from Aetna dated 1999 and 2000), it still did not forward the same to the Union. I find no justification for this delay. Although Respondent points out that indeed it did turn over some information to the Union at negotiation session, at other times, Respondent supplied the information in writing, in between meetings. There was certainly no agreement by the Union to wait until the next meeting to receive the information, and indeed, absent since an agreement, the preferred and more normal practice, is to supply the information as soon as it becomes available to Respondent. It is clearly better in terms of expediting the bargaining process for the Union to have the information, before a bargaining session, so that it can have time to evaluate the information, and perhaps be able to make a counter proposal based on that information.

Here, not only were two negotiation sessions cancelled but, Respondent failed to call the Union as requested, to schedule a new one. Therefore, in these circumstances, Respondent cannot rely on its alleged intent to supply the information at the next meeting to justify its delay.

With respect to the information, as it pertains to non-unit employees, while Respondent did at least have an arguable basis to reject this request for that reason, the Union at the meeting and by letter of its attorney explained correctly to Ellman the relevance of such information. Thus, Respondent had no legitimate basis to reject that request as of February 5, 2001. The record is not clear, as to when Respondent requested of

[34] The rates were $196.80 for single and $484.60 for family.

[35] These rates were $234.40 for single coverage and $577.20 for family.

Aetna, the information included in Aetna's April 17, 2001 letter, which was furnished to the Union of May 23, 2001. In any event, I find no adequate explanation for even that delay, since it had this letter on April 17, 2001, and did not furnish it to the Union until May 23, 2001.

Accordingly, I conclude that based on the foregoing analysis and authorities that Respondent once more violated Section 8(a)(1) and (5) of the Act by failing to timely supply the information to the Union that it requested on January 23, 2001.

B. The Alleged Surface Bargaining

Section 8(a)(5) and 8(d) of the Act requires that the employer meet at reasonable times with the representatives of its employees and confer in good faith with respect to wages and other terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession. *NLRB v. American National Insurance Agents Co*., 343 U.S. 395, 404 (1952). Moreover, "it is not the Board's rule to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement". *Rescar Inc.*, 274 NLRB 1, 2 (1985); *Houston County Electric Cooperative*, 285 NLRB 1213 (1987).

Surface bargaining will be found in two types of cases. The theories for finding violations are somewhat inter-related and rely on similar factors in assessing whether the Act has been violated. However, the theories are not precisely the same.

In one case, the Board examines whether the Employer has entered into collective-bargaining without any intentions of concluding an agreement. *U.S. Ecology Corp.*, 331 NLRB 223, 224-25 (2000); *Houston County*, supra. These cases frequently conclude that the Employer has "gone through the motions" of bargaining, and frustrated the chances of an agreement, in order to a foster de-certification efforts by the employees. *Bryant and Stratton*, supra at 1044; *Radisson Minneapolis*, 307 NLRB 94, 94–96 (1992), enfd. 987 F.2 1376 (8th Cir. 1993); *Prentice Hall Inc.*, 290 NLRB 646, 647 (1985).

The other theory, which as noted above is somewhat related, but distinct from a theory of no intent to such an agreement. That is a party must not enter bargaining with a "take it or leave it" "attitude", and "must demonstrate a serious intent to adjust differences and to reach an acceptable common grounds." *General Electric Co*. 150 NLRB 192 (1964) enfd. 418 F.2d 736 (2d Cir. 1969); *American Meat Packing Co.*, 301 NLRB 835, 836 (1991); *Excelsior Pet Products Inc*.; 276 NLRB 759, 761–762 (1985). Thus, "the mere pretense of negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirement of the Act." *NLRB v. Wonder State Mfg. Co*., 344 F2d. 210 (8th Cir. 1965); *Hardesty Company Inc*. d/b/a *Mid-Continent Concrete*, 336 NLRB No. 18 Slip op p.2 (2001) enfd. 171 LRRM 2001 (6th Cir. Oct. 18, 2002). A violation may be found where the employer will only reach an agreement on its own terms and none other. *Mid-Continent* supra; *Altorfer Machinery Co*., 332 NLRB No. 12 ALJD slips p. 9 (2000); see also *Langston Cos.*, 304 NLRB 1022, at 1061 (1991) (Employer's willingness to agree to contract whose terms Respondent prescribed "is not good faith bargaining: it is merely a direction to do it my way as the only way. To suggest that this is just hard bargaining is to avoid the mutual obligation to compose differences").

In assessing whether an employer has bargained in bad faith, under either theory, the Board looks to the totality of Respondent's conduct both at and away from the bargaining table. *Mid-Continent Concrete*, supra; *Overnite Transportation*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). The Board has enumerated several areas that it considers in evaluating that conduct. They include unreasonable bargaining demands, delaying tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the Union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed upon provisions and arbitrary scheduling of meetings, failure to provide relevant information, as well as conduct occurring away from the bargaining table, *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Bryant & Stratton*, supra; *Mid-Continent Concrete*, supra. Notably, it is not required that an employer must have engaged in all or even most of "the enumerated activities before it can be concluded that bargaining has not been conducted in good faith. Avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale or wide- ranging activities in everyone of those areas…. Rather, 'bad faith is prohibited though done with sophistication and finesse.' *Altorfer Machinery*, supra, ALJD slip op. at 19, quoting *NLRB v. Herman Sausage Co*., 275 F2d. 229, 232 (5th Cir. 1960).

I conclude after careful consideration of the totality of Respondent's conduct, both at and away from the table, that the evidence supports the conclusion that Respondent violated its obligation to bargain in good faith with the Union under either theory. Thus, Respondent has gone through the motions of negotiating without, in fact, any intention of trying to reach agreement, or alternatively, with a "take it or leave it" attitude, which singly or collectively establish surface or bad faith bargaining. *Altorfer Machinery*, supra.

The most significant evidence supporting my conclusions in this regard, can be found in the statements made by Respondent's negotiators and officials, both during negotiations, and prior to the election. These comments have consistently been found by the Board, supported by the Courts, to be significant indications of bad faith, which color the employer's bargaining and manifest objectives of frustration and preventing an agreement from being reached, and or establish "take it or leave it" bargaining. *Mid-Continent Concrete*, supra slip op. at 4; *Burrows Paper Corp*., 332 NLRB No. 15 slip op. p. 1 (2000); U.S. *Ecology Corp*., 331 NLRB 223, 224 (2000); *Bryant & Stratton*, supra at 1044, *Lower Bucks Cooling & Heating*, 319 NLRB 16, 22 (1995), *Enertech Electrical Inc*., 309 NLRB 896, 899–900 (1992); *Tennessee Construction supra; Gadsden Tool Inc*, 327 NLRB 164 (1998); *Langston Cos*., supra at 1061; *American Meat Packing* supra at 836, 839 (1991); *Overnite Transportation*, supra at 671; *Romo Paper Products Co*., 220 NLRB 519, 524 (1975).

Here the record reveals numerous statements made by Respondent's negotiator, as well as by its officials prior to the election, which based on the above precedent, support the conclusion of bad faith bargaining. Thus, at the October 28, 1998 meeting, which was the parties fifth session, Rosaci continued

to press Ellman for his economic proposals, which he had at that point, not yet produced. Ellman replied, "you want a contract, we don't." That remark is as close to a "smoking gun", as you can get, in establishing a desire on Respondent's part to frustrate negotiations and not to sign a contract with the Union. *Gadsden Too,l* supra, (statement by negotiator that employer "is not going to sign a contract"); *Enertech Electrical*, supra (statements by negotiator that "the law doesn't require me to sign an agreement and if I don't want an agreement with you, I don't have to have one", and "the law doesn't require me to agree to anything, … and unless I am satisfied with all the qualifications of the members, I don't intend to sign a contract.") *Tennessee Construction*, supra (statement by Employer's president and negotiator that he was not interested in giving up any of his rights and that he had agreed only to talk with the Union and he had done so.) *Romo Paper*, supra (statement of negotiator that he was "an expert at ripping contracts apart.")

I also place substantial reliance on the response made by Ellman to Rosaci's inquiry if their March 22, 2001 meeting was still on, in view of the filing of the RM petition. Ellman replied, "it's up to you, if you want to meet, I'll meet, but I'm just going to say no to everything." This remark in consistent with Respondent's conduct throughout the negotiations, as well as several other statements made by Ellman during the meetings, which reflect that Respondent "manifested no real intent to adjust differences, but essentially adopted a take it or leave it approach condemned in *General Electric." American Meat Packing*, supra at 836.

Other statements include that I rely on include (1) Ellman's remarks on May 5, 1999, while discussing drug testing. Ellman stated that, "he wasn't going to change his position,"…. "you know where I'm coming from", and when Rosaci asked aren't reasons important, Ellman replied, "I won't change my mind." (2) At the June 24, 1999 meeting, Ellman told Rosaci, "you don't get it – you go as long as you want, impasse is not an issue. Sooner or later, defecate or get off the pot." Later on at the same meeting, Ellman informed Rosaci, "We're not going to be reasonable. We want what we want and I'll sit here for the next three years." Near the close of that same meeting, after Rosaci protested the lack of a wage increase for many years, Ellman answered, "the men made their choice to go through the process with you and that's what we're doing. We're going through a process."

These comments of Ellman demonstrate Respondent's inflexibility and its unwillingness to negotiate with an open and fair mind and a sincere purpose to find a basis of agreement. *Altorfer Machinery*, supra ALJD slip at 35; (statements by negotiator such as, "this company will not sign a contract with seniority in it", that breaks telephone and restroom usage were "the way it was now and (Respondent) had no intent of changing anything", that the management-rights clause that we are offering you is the same management rights we offered you from day one…and "there would be no classifications or descriptions".) As the ALJ therein found, which is applicable to the above comments by Ellman, as well as to many other statements of Ellman, including his "drawing lines in the sand", as to certain issues; "these phrases are hardly words expressing willingness to compromise or to settle differences. Rather, they are phrases of farewell, should the Union seek to negotiate any changes in Respondent's initial counterproposal concerning those subjects." See also, *American Meat Packing*, supra at 836 (negotiator stated "we went through everything and decided what is our bottom line on these proposals . . . we're not here to give here and take there. We came here to say, "gentlemen we're here to convince you, of our proposals." Negotiator later on stated, "we aren't going to move, this is where we stand. Still later he reiterated, "the Employer's position is that we did the give and take before we walked in here. What we have here is our bottom line proposal. We want to convince you on the merits of it so you can convince your people of it.) The Boards finding in *American Meat* that Respondent's "obdurate insistence that agreement would be obtained only by the Union accepting the Respondent's proposal was no hyperbole made in jest, but was fully consistent with the results of bargaining" is equally applicable to Respondent's bargaining herein.

Additionally, the record discloses that Ellman made several other statements at the April 23, 2000 meeting, which are demonstrative of bad faith. At this meeting, Rosaci made a simple request to be informed when vacation was paid by Respondent. Ellman responded, "You don't have to ask me—ask the people." This response of Ellman in and or itself is indicative of bad faith, and is a position that Ellman took on several other occasions, with respect to different issues, such as training, pay for voting, and outside work. When Ellman as he did in this instance, demanded that Rosaci ascertain the information from the Committee, Rosaci would argue that the Committee did not have the answers, and only would know about practices with respect to them or their area. Generally, Ellman would eventually comply with the request, although in each case bargaining was unduly delayed by this clearly frivolous position of Ellman. In this instance however, Rosaci explained that employees had received different answers and were either denied or granted vacation, without knowing the reasons why. Rather, than simply answering the clearly relevant inquiry, Ellman inexplicably replied, "fuck you." Rosaci responded in kind, "Fuck you" all we need is "a company policy", to which Ellman again responded, "fuck you". Rosaci then stated that if Ellman would not give him an answer, he would put it in writing. Ellman replied, "I'll wipe my ass with it like I do with all your other requests."

Later on at the same meeting, as Rosaci was attempting to discuss several issues, Ellman stood up, began to rock back and forth looking out of the window, with his back to both Rosaci and the committee. This conduct caused Rosaci to remind Ellman to pay attention and stop looking out the window, when Ellman claimed not to have understood what Rosaci was saying. A few minutes later, while Rosaci was out of the room, making copies, Ellman addressed the bargaining committee, and said, "This is your choice guys." Similarly at the October 20, 1999 meeting, Rosaci complained to Ellman that Respondent hasn't changed since negotiations started. Ellman replied, "you got it" and after some further discourse, Ellman stated, "you see the men are shaking their heads, they know you're full of shit."

While a certain amount of incivility, and sometimes even obscenities can be expected during the give and take of bargaining, Ellman's conduct as detailed above clearly goes over the line into the area of bad faith. There was simply no justification or provocation, for Ellman to have cursed at Rosaci, during these meetings, nor for his disgraceful remark about, "wiping his ass" with Rosaci's information requests. The evidence discloses, and I conclude that Ellman's conduct at these meetings were calculated attempts to denigrate the Union in the eyes of the employees, to demonstrate contempt for the bargaining process, and to persuade the employees through the committee, that the Union had not and would be successful in obtaining a contract, and to convince them that ridding themselves of the Union, is the preferred option. Such conduct is a further indication of Respondent's bad faith, as it suggests that Respondent intended to prolong the bargaining process, undermine the Union, and lead to a de-certification process. *Bryant and Stratton*, supra at 1042; *Radisson Plaza*, supra at 96; *Prentice Hall Inc*., supra at 647 (1988); *Burrows Paper Co*., supra. (Statements by negotiator denigrating the Union plus the comment that he wanted to run his business as he saw fit, as he had before the advent of the Union).[36]

I also rely upon statements made by Respondent's officials prior to the election, as found in the prior Board decision herein (325 NLRB 617 1992). In that case the Board affirmed several findings of the ALJ that are pertinent to the bargaining that took place in the instant matter. Thus, during a meeting of employees, John and Connie Pezulich committed several violations of the Act, including threats of discharge, plant closure, denial of future benefits, as well as threats that the selection of the Union as their representative is futile.[37] These violations of Section 8(a)(1), as well as several Section 8(a)(3) violations, including the cancellation of the medical benefits of employee, Elick Dargan, who filed the RD petitions to get rid of Local 157, which led to Local 455 representing the employees,[38] are also significant.

These unfair labor practice are relevant to an assessment of Respondent's bargaining in the instant case, as well as a demonstration of its animus towards its employees choice of Local 455 as their representative, and are indicative that Respondent was not making a sincere effort to reach agreement. *Langston Co*., 304 NLRB 1022, 1061 (1990); *Mid-Continent Concrete*, supra slip op at 4; *Lower Bucks Cooling*, supra at 22 (1995); *U.S. Ecology* supra; *Overnite Transportatio,n* supra at 671. As the 7th Circuit aptly observed in enforcing *Overnite Transportation*, supra, "there is more to this case than bargaining stance; Edwards openly declared the company's unlawful intentions prior to the commencement of collective-bargaining. And, when those statements are viewed alongside *Overnite's* behavior at the bargaining table, there arises a fair inference that *Overnite* was not honestly and in good faith attempting to preserve uniformity among its terminals. In other words, *Overnite* was not 'persuaded', because it never had any intention to be 'persuaded'; the company was making good on a promise never to cooperate with the Union."

This quote is equally applicable to Respondent here. Respondent made threats of reprisals and threatened the employees that bargaining with the Union would be futile. Its bargaining at the table was merely a confirmation of that threat.

In this connection, Respondent argues that these unfair labor practices should not be considered as evidence of bad faith, since the violations occurred back in 1994, and are too remote in time to be relevant to bargaining that took place from 1998 through 2001. I do not agree. The unfair labor practices found although occurring several years ago, were in connection with the organizing campaign, that led to the eventual certification of the Union in 1998. The violations were committed by, John and Connie Pezulich, both of who are still high company officials, and indeed Connie Pezulich was present at several bargaining meetings. It is therefore, appropriate to rely on the preelection conduct of Respondent as evidence of its bad faith in the current negotiations.

Other significant factors in establishing bad faith, as outlined in *Atlanta Hilton*, supra, are dilatory tactics and arbitrary scheduling of meetings. In this regard, the Act requires that the employer meet with the Union at reasonable times. While a party is free to select whomever it chooses as its bargaining representative, considerations of personal convenience, including geographic or professional conflicts, do not take precedence over the statutory demand that the bargaining process take pace with expedition and regulatarity. *Caribe Staple Co*; 313 NLRB 877, 893 (1994); *Vineland Nursing Center at Vineland*, 318 NLRB 901, 905 (1995). An employer acts at its peril when it selects an agent incapacitated by these or any other conflicts. *Caribe Staple*, supra. An "employer's chosen negotiator is its agent for the purposes of collective-bargaining, and if that negotiator causes delays in the negotiating process, the employer must bear the consequences". *Calex Corp*. 322 NLRB 977, 978 (1997), enfd. 144 F.2 3d 404, 904, 910 (6th Cir. 1998). "a lawyer's busy schedule is not an acceptable excuse for a failure to meet at reasonable times and bargain collectively." *NLRB v. Milgo Industries, Inc*., 567 F2d 540, 544 M.6 (2nd Cir. 1977).

Applying these principles to the facts herein, I conclude that Respondent has failed to meet its obligations to meet at reasonable times with the Union. Respondent set the tone for negotiations by unduly delaying the start of negotiations. Thus, on May 12, 1998, 3 weeks before the certification, but after the revised tally of ballots had shown that the Union had won the election, the Union requested that it be contacted to set up a meeting. This letter was ignored, requiring a follow-up letter sent on June 18, 1998 (after the certification).

After several letters between the parties, with the Union pressing for an early meeting, Ellman finally agreed to a meeting on August 11, 1998, over 2 months after the June 4, certifi-

[36] While Ellman, unlike some of the negotiators in the above cases, made no direct reference to a possible loss of majority or a new vote, in my view his statement to the committee, outside the presence of Rosaci, "this is your choice, guys" is a clear statement to them that after 23 sessions and such little progress, that they made a mistake in choosing the Union, and an implicit suggestion that they rectify that mistake. i.e. by decertifying the Union.

[37] The specific statement forming the basis for this finding was John Pezulich's remark that there would be "that no one coming in and telling him how to run his business.

[38] It is notable in this connection that medical benefits was one of key issues during the instant negotiations.

cation, and nearly 3 months after the Union's request to set up a meeting.[39] I find that this delay in setting up negotiations was an indication of Respondent's failure to meet at reasonable times with the Union. *Frank E. Nash Fence Co*., 242 NLRB 233, 235 (1979) (Delay of 7 weeks in setting up initial meeting unreasonable).

Once the meetings began, while Respondent did meet with the Union 29 times, these sessions occurred over a period of 2 ½ years, which means that the parties met on the average of once a month. This is insufficient to meet Respondent's obligation to meet at reasonable times with the Union, particularly, where as here, it is a first contract. *Radisson Plaza*, supra at 96 and at 112–113, (11 meetings over 8 months held insufficiently frequent, particularly, since it was a first contract); *Bryant & Stratton* supra at 1042, (Respondent made itself available, approximately one day a month). *Celex Corp*., supra, (19 sessions over 15 months insufficient), *A .H. Belo*, 170 NLRB 1558, 1565 (1968), (meeting once a week for 2 hours at a time insufficient). In this connection, I note that the evidence discloses that the primary reason for the infrequency of the meetings was the unavailability of Ellman and or Respondent's officials, when Pezulich attended meetings. The Union was consistently pressing for more frequent meetings, and meetings at earlier dates than proposed by Ellman. *Celex*, supra, *Bryant & Stratton*, supra.

Additionally, the meetings were generally limited to 3 hours or less, and were further shortened by Ellman's conduct of frequently taking phone calls during negotiations,[40] being late to a number sessions,[41] and by leaving the meetings early.[42] Moreover, Ellman cancelled eight of the 29 sessions scheduled, including the final scheduled meeting for March 22, 2001 when he simply did not show up.[43]

The above evidence demonstrates that Respondent has failed to meet its obligations to meet at reasonable times, by being primarily responsible for the parties not meeting sufficiently frequently over the period of 24 months, *Bryant & Stratton*, supra, C*elex*, supra, *Radisson Plaza*, supra, by canceling numerous meetings, *Lower Bucks*, supra at 22; *Nursing Center at Vineland*, supra; *Golden Eagle Spotting Co. Inc*., 319 NLRB 64, 76 (1995), arriving late and leaving early at a number of meetings, *Golden Eagle*, supra, and further delaying bargaining by constantly taking phone calls during meetings, instead of using the few hours per month that Respondent agreed to meet, to engage in collective bargaining. This conduct is a significant indication of bad-faith bargaining. *Celex*, supra, *Bryant & Stratton*, supra; *Radisson Plaza*, supra. Somewhat related to this conclusion, is the failure of Respondent's vice president, Connie Pezulich, to appear at meetings after the 12th bargaining session on May 5, 1999. No reason was ever given for Pezulich's non-appearance, other than she had other things to do.[44]

While it is not inherently unlawful for an employer to refuse to have a member of its management team present at negotiations, where the evidence discloses that the absence of an official or negotiator with sufficient knowledge of the terms and conditions of employment of the employees causes bargaining to be substantially delayed on impeded, it can be an indication of bad faith. *Wisconsin Steel Industries*, 318 NLRB 212, 223 (1995). I so find. Here, once Pezulich failed to appear for the remaining 17 sessions, I conclude that bargaining was substantially impeded by her absence. Thus, the record reveals that on numerous occasions, Ellman could not answer an inquiry made by Rosaci about various issues, which required Ellman to check with the company and get back to Rosaci, or required Ellman to make phone calls during the meeting to obtain the answer.[45]

Moreover, I also rely in this regard, on *Borg-Warner Controls*, 198 NLRB 726, 729, 733–734 (1972), where the Board found that the refusal of the Employer to make its negotiators available for bargaining was evidence of a design to avoid bargaining. In that respect, the ALJ made observations, which are equally applicable to Ellman's failure to make himself available for more frequent meetings, as I have detailed above. Thus, the ALJ, citing *A. H. Belo*, supra concluded that

[39] While it is true that there is no obligation to meet with the union until the certification, in this instance once the tally of ballots was issued, after the Board decision on challenges, there was no question that the certification would issue, since no objections were likely. Thus, Respondent had no basis for ignoring the request, and should have at least set up a tentative meeting, while awaiting the certification.

[40] Ellman took phone calls at the meeting of September 15, 1998, June 24, 1999, November 18, 1999, February 10, 2000, March 18, 2000, three times during the April 11, 2000 meeting, July 6, 2000, November 28,2000, and January 20, 2001. Moreover, on May 23, 2000, Ellman delayed, the start of the meeting 15 minutes, because he was talking with an attorney for Local 810, IBT, who happened to be at the NYSERB.

[41] Ellman was late for the meetings of September 15, 1998, June 10, 1999, July 6, 1999, September 23, 1999, November 18, 1999, May 23, 2000, and November 28, 2000.

[42] Ellman left the February 8, 1999 meeting because he was allegedly sick, the June 24, 1999 meeting because he had to go to Newark, New Jersey to pick up a relative, the August 23, 1999 meeting because he had to go to his office to pick up paperwork for a trip to El Paso, on November18, 1999, because he had a strike going on, and at the May 23, 2000 meeting, he stated that he had to leave at 3:30 without providing any reason.

[43] While Ellman argues that his failure to appear at that meeting was inadvertent and based on his mistaken belief that Rosaci had cancelled the meeting the previous week, I find this argument unpersuasive. I note that even crediting Ellman's testimony, nothing was said during his conversations with Harper and Rosaci about canceling the Board Hearing concerning the negotiation scheduled for March 22, 2001. Moreover, after Ellman did not appear, Ellman ignored Rosaci's request by phone to call and reschedule another meeting.

[44] I note that Rosaci protested Pezulich's absence on several occasions, asserting that it was easier if the Company's representative was there. Ellman replied that he was there to represent Respondent. At the June 10, 1999 meeting, Rosaci requested that Respondent implement its wage offer, in view of the 7-year delay in wage increases. Ellman replied that he would relay the proposal to his client, but not with his recommendation. Rosaci protested that Pezulich was not there to hear his argument, and felt it was a difficult situation for the Union, to rely on Ellman, who is against the proposal to make the Union's arguments.

[45] The problems and delays occurred during the meetings of May 24, 1999, June 10, 1999, September 23, 1999, November 18, 1999, February 10, 2000, March 8, 2000, April 11, 2000, and August 9, 2000. Additionally, as noted above, Pezulich was not present to hear the Union's argument in support of its request that Respondent implement its wage offer, and had to rely on Ellman to relay the Union's position to Respondent.

> "parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective-bargaining negotiations as they display in other business affairs of importance. 'Labor relations are urgent' matters too' *M. System Inc. Mobile Home Division Mid States*, 129 NLRB 527, 549 (1960)"(Held that in agreeing to meetings over a period of 1½ years, Employer did not display the degree of diligence that proper performance of its bargaining obligations required, by meeting only 18 times.)

The Board subsequently repeated this position in *Insulating Fabrications Inc*., 144 NLRB 1325, 1328–1329 (1963), enf. 338 F2d. 1002 (4th Cir. 1964).

> Labor relations are urgent matters, too. If (the) other activities of Respondent's attorney made it impossible for him to devote adequate time to reasonably prompt and continuous negotiations, it was the Respondent's obligation to furnish a representative who could. The duty to bargain in good faith includes the duty to be available for negotiations at reasonable times as the statute requires. That duty is not discharged by turning over the conduct of negotiations to one who's other activities make him not so available." Id at 1329. (Board concludes that being available to meet once a month did not meet that obligation).

Thus, Pezulich, as well as Ellman had an obligation to make herself (or some other official who was sufficiently familiar with terms and conditions of employment of Respondent's employees), available particularly where as here, her absence unduly delayed bargaining, which was already unduly delayed by the failure of Ellman to be available himself, as well as other delaying tactics of Ellman, as detailed above.

I also conclude that Ellman's conduct during negotiations revealed other delaying tactics which impeded bargaining and are an indicum of Respondent's bad faith. I have already referred to Ellman's practice of demanding that Rosaci ask the committee to provide answers to inquires Rosaci made about current conditions of employment. As I have found above this tactic denigrated the Union's status, and unduly delayed bargaining, since it required Rosaci to make a patently obvious explanation, that the committed would not necessarily know the answers, since it might know only how they were treated, and in any event, the Union is entitled to a statement of company policy and current conditions of employment of employees. Once more I note that Ellman is an experienced labor negotiator, who knows full well that the Union is entitled to answers to these questions, and that he has not even an arguable basis to demand that the Union obtain answers from the committee. Therefore, I find this conduct of Ellman further evidence of Respondent's bad faith.

Similar to this conduct of Ellman, is another specious and frivolous position that Ellman advanced on several occasions when Rosaci asked for information on several subjects, such as sub-contracting, pay for voting, health plan information, and employees paid the Federal minimum wage. I conclude that Ellman's conduct in asserting frivolous reasons for his initial refusals to supply this information, further delayed bargaining by requiring Rosaci to explain why the information was necessary, and at times, requiring follow up letters from the Union's attorney to obtain the clearly relevant information.

Thus, at the meeting of June 24, 1999, Rosaci asked for information about employees receiving the federal minimum wage, since that had been Respondent's proposal on minimum rates. Ellman initially refused to provide this information, asserting this information cannot make a difference in the Union's position, because Respondent would not agree to a contract with more than a federal minimum wages. He added that if the Union got a contract that the Federal minimum rate would be the minimum rate. Rosaci protested that the Union needed tools to develop arguments. Ellman answered, "You know our position."

Similarly, at the same meeting, Ellman informed Rosaci that the Union's request for information on subcontracting was not relevant, "because there won't be a contract with any limitations on subcontracting." Rosaci provided reasons why the Union needed the information, and Ellman repeated "there won't be any contract with a prohibition on subcontracting."

These reasons expressed by Ellman for his initial refusals to supply this clearly relevant information, are nothing short of preposterous. The fact that Respondent may be asserting a particular position strongly, even if in good faith, does not mean that the Union is not entitled to the opportunity to convince it to change its mind. This is the essence of bargaining. Respondent's assertion that because it does does intend to change its position, the information is irrelevant, is not only frivolous, but indeed indicative of its closed mind "take it or leave it" attitude that it demonstrated throughout the bargaining process.

Equally frivolous is Ellman's response to the Union's request for information at the April 11, 2000 meeting, concerning company policy on pay for voting. In addition to initially demanding that Rosaci obtain the information from the committee, which I have already concluded above was evidence of bad faith, Ellman also asserted that "its not material," because they "were negotiating a new contract, and contract negotiations can be up or can be down."

While that latter statement may be true, it has no bearing on the materiality or relevance of prior practice. There can be no doubt that the Union is entitled to know what Respondent's current or past practices are with on this or any issue under discussion. The fact that Respondent may or may not be obligated to continue that practice, does not mean that the Union is not entitled to know what the practice is. These observations cannot be seriously disputed and I again conclude that Ellman, an experienced, practitioner, had to have been aware that his positions, in this regard, were not lawful, and were interposed in order to delay the bargaining and to denigrate the status of the Union in the eyes of the employees.

Additionally, as I have detailed above, I conclude that Respondent unduly delayed the furnishing of relevant information to the Union on a number of occasions both inside and outside the 10(b) period. Such unlawful conduct has been consistently found to be a significant indicia of surface bargaining, *Bryant & Stratton*, supra at 1044; *Radisson Plaza*, supra at 95; *Summa Health Systems*, 330 NLRB 1329 (200), *Bethea Baptist Home*, 310 NLRB 156 (1993).

I so find, and conclude that Respondent's conduct of failing to supply relevant information to the Union in a timely fashion, "further manifested the objective of frustrating and preventing an agreement from being reached." *Mid-Continent Concrete* supra, slip op at 4.

I now turn to an examination of the proposals that Respondent advanced during negotiations, as well as its positions concerning the Union's proposals. In so doing, I am mindful of the settled principles of law stated above, that the Act does not compel either party to agree to a proposal or make a concession, *Bryant & Stratton*, supra, *American National Insurance*, supra. Nonetheless, it is permissible to evaluate proposals made in order to determine whether Respondent had made a genuine and sincere effort to reach agreement. "Such an examination is not intended to measure the intrinsic worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mind set open to agreement or one that is opposed to true give and take." *Hydro-Thermo, Inc*., 302 NLRB 990, 993–994 (1991).

I emphasize also that I have evaluated these proposals in light of the conduct engaged in by Respondent, both inside and outside the bargaining table, which as I have detailed above, are reflective of bad faith bargaining *Mid-Continent Concrete* supra; *Overnite Transportation* supra. Indeed, in my view, Respondent's conduct in that regard is so pervasive, it would be sufficient in of itself, to justify a finding of surface bargaining by Respondent, without even the necessity of examining the proposals offered and the positions taken at the table.

Nonetheless, I shall examine the substance of the proposals of Respondent, since it only confirms the conclusion that Respondent bargained as its officials had threatened before the election, and as Ellman its negotiator, stated during the negotiations,[46] without a sincere desire to settle differences *Radisson Plaza*, supra. "It was not constructively approaching the collective-bargaining process with an aim of reaching agreement with the Union." *Overnite Transportation*, supra at 671.

In that regard, Respondent made contract proposals significantly more onerous than that contained in Local 157's prior contract, as well as past practices. In this connection, the record is not totally clear, as to which provisions of the prior Local 157 contract were actually in effect when bargaining commenced in August of 1998. The parties stipulated that the terms were in effect until at least 1995.[47] Thereafter, the record indicates that Local 157 "walked away" from the shop, apparently since the tentative results of the election showed that it was not likely that it was going to be the collective-bargaining representative of Respondent's employees any longer.[48]

Thus, although Local 157 may have "abandoned" the shop, this does not mean that the terms and conditions established under their contract were not still followed. Respondent adduced no evidence that any particular term was not followed, except for the health coverage clause, and evidence was adduced by General Counsel that a number of terms in the contract, which were discussed during bargaining, including nonmandatory overtime, bereavement pay without proof of death, and personal days, continued in effect up to and including bargaining. Moreover, I also note that Respondent itself asserted that its contract with Local 157 was in effect in the prior ULP case, in arguing that the no-strike in the contract justified the discharge of some employees.[49]

Accordingly, in these circumstances I presume and conclude, that absent evidence to the contrary, that the terms of the Local 157 contract were still the established terms and conditions,[50] of employment for Respondent's employees at and during the bargaining.

The chart set forth below, details the Respondent's initial proposal, as opposed to Local 157's contract, (and as I have found the terms and conditions in 1998 as well; with respect to various issues.

[46] As noted above, Ellman said at one point during negotiations, "you want a contract, we don't", and at another point, told Rosaci that he was willing to continue to meet, "But I'm going to say no to everything."

[47] In this regard, the record discloses that the last signed contract between the parties, ran from March 2, 1988 to March 1, 1991, with an automatic renewal clause. The record does not reflect whether Local 157 made any attempt to negotiate a new contract with Respondent in 1991 in or about or thereafter. The ALJ in the prior Regency case found that no new agreement had been negotiated as of late 1991, when employees became dissatisfied with the failure to receive benefits under the contract.

[48] Thus, the initial tally showed 15 votes for Local 455, 8 for Local 157, 13 for no representation; with 13 challenges. It did not take a mathematical genius to determine that after the challenges were resolved, that Local 157 would not be the representative, and the results would be either a certification for Local 455 or a certification of results.

[49] Indeed, the Board remanded that portion of the case to litigate that issue.

[50] With the exception of health coverage, which was terminated by Respondent, in January of 1993.

Issue	Employer's Proposal (1998)	Local 157 Contract
Admin fee for check off	10%	N/A
Union to Indemnify For Check off (improperly deducting dues)	Indemnify. For ER	N/A

Overtime	After 40 hours	After 8 hrs/day, 40 hrs/wk or beyond reg. Sched. Quit Time Art. 9 p. 5
Reporting pay	2 hours does not apply if work not available	4 hours if work available or not Art. 9 p. 5
Holiday pay	If falls on workday	If falls on any day of week Art. 10 p. 6
	ee on payroll for X period	No Requirement
	N/A	Work on holiday 1.5X + holiday Pay Art. 10 p. 6
Holiday during vacation	Time off or pay at er discretion	Time off Art. 11 p. 7
Substitution of holidays	By majority vote of ees & er	N/A
Saturday overtime	N/A	Min. of 4 hours Art. 9 p . 5
Sunday work	N/A	2.5X pay Art. 9 p. 5
Arbitrator	Designate arbitrator or NYSERB if none avail.	No Designat. of arbitrator Refer to NYS Med. Bd. Art. 24 p. 10
Limits on Arbitrator	Section (A thru 1)	N/A
Settlement of disputes	By procedures set out-not any other forum or agency	N/A
ee engaged in illegal strike	Deemed to have quit	N/A
If ee thereafter hired restitution of bens. Etc.	At discretion of er	N/A
Extent of discipline imposed by ER under "Strikes or Lockouts"	Excluded from arbitrator's review	N/A
Crossing picketine	N/A	Vee has rt not to cross Art. 20 p. 9
Notification of Visitation	By fax 3 days in advance	N/A
Seniority Calculation	By date of hire, less deductions for unpaid time (incl. Leave of absence, Workers Comp., Disability)	Seniority accrues during Leave of Absence and Layoffs of Less than one year Art. 7 p. 4
Seniority	By Department	N/A
Seniority Provisions	Effective only if production & efficiency of co. not impaired-sole discretion of ER	N/A
Probation	90 days	30 days Art. 4 p. 3
Probationary EE	Not covered by Agreement	N/A
Extension of Probation	Extend 30 days by notice to ee by er	Extend by mutual agreement Art. 4 p. 3
Reasons for Termination, Loss of Seniority & Recall Right Forfeiture	For failure to return to work w/in 2 days of recall; absent for 2 consec. Days w/out advising co in advance & daily & giving satisfact. Reason; ee overstays LOA; gives false reason for LOA; engages in other empl. During LOA; Laid off for continuous 2-month period; falsifies empl. Application	Layoff of more than one year Art. 7 p. 4
Benefit Accrual during layoff	None	Seniority accrues during layoff of less than one year Art. 7 p. 4
Layoff	er decision based on ability & if ability = then seniority	Least Senior laid off Art. 7 p. 4

Leave of Absence	At sole discretion of er	Reasonable LOA should be given For personal illness, military duty, Maternity leave, Union Activity, by mutual consent
Seniority Accrual during LOA	None	Seniority Accrues Art. 12 p. 4
Discharge during LOA	For working elsewhere during LOA	N/A
During LOA	No accrual of Sick Days or Vacation	Accrual of Sick Days & Vacation Art. 12 p. 8
Proof of Death for Bereavement Pay Eligibility	Proof may be required	N/A
Vacation Pay	None to terminated ees or to ees that resign w/out 3 wks written notice	Pro-rated pay for voluntary or involuntary termination-2 wks notice for resignation Art. 11 p. 7
Bulletin Board	2X2	At least 3X4 Art. 27 p. 11
Medical Examinations	May be required	N/A
Payday	Bi-monthly	Weekly
Temp., Agency, Contract Labor	May be used to do unit work & excluded from Agr.	-ees excluded from Unit can't do unit work Art. 17 p. 8

Moreover, over the course of negotiations, Respondent took several others positions, either in response, to proposals of the Union, or as a proposal of its own, which also constituted more onerous terms than the employees current conditions and or under the Local 157 contract. These proposals include the requirement that overtime be mandatory, which was contrary to both prior practice and prior contract; Respondent's position that it would not agree to specify which consecutive days would define a work week, when both past practice and the Local 157 contract defined the work week as Monday through Friday; Respondent proposed that employees must request sick leave at least 2 hours prior to the starting time of the requested day, contrary to past practice. Moreover, the prior Local 157 contract contained no such requirement. Respondent proposed that employees be required to present to it proof of death in order to receive bereavement pay, contrary to past practice, as well as the fact that Local 157's contract provide for bereavement pay, without such a requirement; Respondent proposed that employees must give two weeks advance notice before taking a personal day, again contrary to past practice, and to the Local 157 contract which called for personal days, without any notice requirement; Respondent proposed a plan for drug testing of employees, which was not contained in the Local 157 contract, and was not a past practice; Respondent proposed that temporary workers could be hired to do unit work, and would be excluded from coverage of the agreement; Respondent proposed that any of the holidays set forth in the agreement, may be changed, upon the majority vote of the employees in the facility, and the written consent of the Employer. The Local 157 contract contained no such clause;[51] Respondent proposed an extremely broad management rights clause,[52] existed in the Local 157 agreement, and Respondent proposed that employees would be required to provide actual proof that they voted, before receiving 2 hours pay. In the past, employees were paid any such proof, or even to have stated that they voted. The Local 157 contract did provide that employees must be able to produce a voter's registration card to Respondent to be eligible for this pay. Significantly, the Union offered to include a provision in this contract that employees produce a voters registration to be eligible for pay, as well as an affidavit stating that they voted, but Ellman rejected both options, asserting that they do not prove that the employees actually voted.

In this regard, standing alone, proposals that represent reductions in current conditions of employment, do not necessarily warrant a conclusion that bargaining is not conducted in good faith *Altorfer* supra ALJD Slip at 20; *Hamady Foods Market*, 275 NLRB 1335, 1337 (1985), *Concrete Pipe Products Co*., 305 NLRB 152, 153 (1991). However, "when employees select a bargaining agent which is immediately confronted with proposed reductions in existing employment terms and conditions, there is some basis for questioning whether such proposals are punitively motivated—are intended to penalize employees for the very fact of exercising their statutory right of electing a bargaining agent and, beyond that, to impress upon them that they continue to not to enjoy statutory protection to which the Act entitles them. Those are the types of statutory vices underlying the conclusion that "bargaining from scratch threats violates the Act." *Altorfer*, supra ALJD Slip op at 20.

Thus, the Board has frequently found that an employer's proposals for substantial reductions in existing benefits are evidence of bad faith, particularly whose these proposals are not accompanied by adequate explanations, and or are maintained consistently throughout negotiations, without any efforts

[51] When Rosaci questioned this clause, and made a counter-proposal that holidays can be changed with mutual agreement between the parties, Ellman rejected this request. Ellman when asked why, explained that he does not think that the Union represents the interest of the employees. I find this remark of Ellman further evidence of Respondent's efforts to denigrate the Union in the eyes of the employees, to foster decertification, and is further evidence of its bad faith. *Bryant & Stratton*, supra, *Radisson Plaza*, supra.

[52] The specifics of this clause will be discussed in more detail below.

at compromise. *Altorfer Machinery*, supra, *Mid-Contintent Concrete*, supra, slip op. at 3; *Bethea Baptist Home*, 310 NLRB 156, 157 (1993); *Wisconsin Steel*, supra at 222; *Houston County Electric Corp.*, 285 NLRB 1213, 1215 (1983); *Romo Paper*, supra at 84. See also *Borg Warner Controls*, 198 NLRB 726, 727–728 (1972) (the Board finds that even minor reductions in existing terms, which may be viewed as "de minimis" when considered independently, are significant in context, since these reductions were coupled with "rigidly holding the line in all other areas." Thus the Board considers that the Employer "could only have anticipated that the Union would have had great difficulty in accepting proposals and reaching agreement." Id. at 728.

Here I conclude that Respondent's conduct fits within the rationale of the above cited cases, since it failed to offer any specific or convincing rationale for its proposals to sharply reduce existing benefits, and it insisted on these proposals throughout negotiations, without demonstrating any flexibility or efforts to compromise.

Indeed, I note that when the Union sought to ascertain Respondent's prior practices in several areas, Ellman initially resisted furnishing the information, by either relegating the Union to obtain the answers fro the committee, and or asserting that the Respondent's past practice is immaterial, since what is relevant is what Respondent wants now. In this regard, Ellman consistently dismissed any arguments relative to Local 157's contract on similar grounds. Essentially, what Respondent was saying is that since this is a new contract, with a new Union, past practice is irrelevant, and everything "starts from scratch." This position is not good faith bargaining. It is true that prior benefits are not guaranteed, and an employer is not required to retain any particular benefit or condition of employment. Moreover, during the course of bargaining, benefits can be traded, in exchange for other benefits, and it is not per se unlawful, as noted above, to propose benefits reductions. That is a far cry, however, from Respondent's position here, that since this is a new contract and a new Union, it does not matter what prior conditions were, and Respondent is entitled to propose and or insist on elimination of current conditions or benefits, simply because it wants to and or it believes that it needs these changes to run its business, the way it sees fit. I conclude that this conduct is suggestive of an intent to punish its employees for selecting Local 455 as its bargaining agent, rather than continue to be represented by Local 157, a Union with which Respondent's was more "comfortable," and a Union that perhaps allowed Respondent to run its business without interference.

I rely, in part, in making this conclusion on Respondent's bargaining with respect to several subjects. As related above, the Local 157 contract provided for, two hours of time off with pay, for election day, for the purpose of voting, and required that employees "must be able to produce a Voter's Registration card to his or her Employer." Notably, in practice Respondent did not require employees to produce a voter's card or any other evidence of voting, and simply paid the employees the two hours pay without question. However, in the instant negotiations Respondent proposed and continued to insist, that employees present proof that they voted in order to receive pay. The Union protested this requirement, relying on past practice, but attempted to meet Respondent's alleged concerns that people actually vote before receiving the pay. In fact, the Union offered that employees produce voter's card as proof, which was the very requirement that Respondent agreed to in the Local 157 contract, a requirement, which in fact, Respondent did not even insist upon in practice. Yet, Ellman inexplicably rejected that offer of the Union, without explaining why it was acceptable in Local 157's contract, but not in a contract with Local 455. Moreover, it also rejected the Union's further offer of an affidavit from employees attesting that they voted, as insufficient proof that employees actually voted. Further, the Union even went down to the New York of Elections and ascertained that it does not provide any proof of voting to voters and communicated this to Ellman.

Respondent argues in this regard that it is not unreasonable for it to require proof of actual voting, before providing two hours pay, for this purpose. That is certainly true in the abstract, and indeed Respondent is not obligated to provide this benefit at all, whether or not employees vote. However, in this case, Respondent has in the past given the benefit without requiring any proof of voting, not even enforcing as it could have, the contractual requirement of producing a voter's card. No evidence was presented that employees were abusing this privilege, and Respondent provided no explanation as to why it found it necessary to change its position on this issue, even to the extent of rejecting the Union's proposal to agree to the same requirement as in the prior contract, the production of a voter's card.

At the April 11, 2000 session (the parties 23rd meeting), Rosaci raised the subject again and inquired why Respondent was asking for proof of voting now, when they haven't asked before. Ellman responded; "because, that's the way I want it." Rosaci then asked for Respondent's current policy, to which Ellman again demanded that he ask the committee. When one committee member stated that he had gotten paid, Ellman said "see you can get your answer from the committee." Rosaci, then patiently explained, that he needs to know company policy, and not just what happens with committee members. Ellman answered", it's not material." Rosaci repeated his inquiry as to why Respondent paid people in the past, regardless of whether they voted and didn't, ask for documentation, "and asked why is there a difference now?" Ellman answered, "because were negotiating a contract, and contract negotiations outcome can be up or down. The Company wants not to give benefits for the people unless they are sure they are eligible for it." Rosaci quite reasonably concluded, "Well the only difference then is the Union." Interestingly, Ellman did not even deny this assertion of Rosaci, but answered only "I didn't say that," and began to whistle and look out the window. The above facts on overwhelmingly demonstrate that Respondent, as Rosaci correctly observed, was insisting on this position in retaliation for the employees' support of the Union, and in order to denigrate the Union, in the eyes of the employees and to frustrate agreement.

I also find this evidence reflective of similar positions taken by Respondent to reduce or change other benefits, without any explanation, such as requiring two weeks notice before allow-

ing employees to take a personal day, and 2 hours notice before taking sick leave, contrary to past practice.

I also rely on Ellman's conduct at the July 21, 1999 meeting, as indicative of Respondent's bad faith. The parties were discussing the Union's proposal on reporting pay, and Respondent had previously agreed to that portion of the clause that provided that employees be paid for the day, if he, an injured employee is, admitted to the hospital or instructed by Respondent or a doctor to refrain from work that day. However, Rosaci protested that it was inconsistent for Respondent to agree to that provision, but not agree with another portion of the proposal that provides that if an employee, is injured on the job and is sent to a doctor and returns to work, he shall be paid for time lost that day. Thus, Rosaci argued that it is inconsistent to pay someone when he's told to go home, based on an injury, while not paying someone who goes to a doctor and returns to work. Ellman then got angry, took a phone call, and after further discussion said, "now we reject Section C totally. Now its consistent." Thus, Respondent withdrew one of the very few agreements that it made to any portions of the Union's proposals, in a fit of pique, merely because Rosaci had the temerity to question the consistency of Respondent's position. This constitutes further evidence of bad faith, as it demonstrates Respondent's attitude toward bargaining, further denigrates the Union in the eyes of the employees, and further frustrates bargaining. Indeed, the Board has long considered the withdrawal of agreements previously reached, without adequate explanation, or change in bargaining circumstances, not present here,[53] to be evidence of bad faith *U.S. Ecology Corp*., supra at 2256 *Mid-Continent Concrete*, supra; *Wisconsin Stee,l* supra at 222, *Dayton Electric Plate Inc*., 308 NLRB 1056, 1064 (1992); *San Antonio Machine & Supply Co.*, 303 F2 633, 636–637 (5th Cir. 1966). I so find.

I now turn to a more detailed analysis of some of Respondent's proposals, and particularly the interplay and effect of these proposals with each other, and ultimately on the Union's representations rights. Initially, I note that Respondent proposed, and continued to insist in pertinent part, upon an extremely board management rights clause, which as noted did not appear in the prior Local 157 contract. This proposal states inter alia;

ARTICLE
Management's rights

> The EMPLOYER shall at all times, subject to provisions of this Agreement, have full control of matters relative to the management, personnel and the conduct of its business. The Management shall control the plant and its operations, the direction of its working forces, the methods of production, wages, employee scheduling, general management of its employees, plant and buildings, care and use of its machinery and material, and the right to hire, promote, transfer and discipline its Employees.
>
> The right of the EMPLOYER to make such rules and regulations, not in conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, safety, and/or effective operation of the company facility, and after advance notice thereof to the Union and the Employees to require compliance therewith by Employees, is recognized.
>
> The EMPLOYER retains the sole right to determine the amount of work an Employee may be required to perform, and to discipline and discharge Employees for cause, provided that in the exercise of this right it will not act in violation of the terms of this Agreement. Complaints that the EMPLOYER has violated this paragraph may, unless otherwise herein restricted, may be taken up through the grievance procedure. The Employers right to determine the extent of the discipline to be imposed on an individual basis taking into consideration the severity of the infraction, the tenure of the Employee as well as the Employees' over work record is hereby acknowledged.
>
> Except as specifically abridged, delegated, granted or modified by this Agreement, or any supplementary agreements that may hereafter be made, all of the rights, powers, and authority the EMPLOYER had prior to the signing of this Agreement is retained by the EMPLOYER, and remain exclusively and without limitation within the rights of management, which are not subject to the grievance procedure and/or arbitration.
>
> It is recognized that the EMPLOYER may at its sole discretion retain temporary, agency and contract labor employees to perform unit work as necessary; which said workers shall be excluded from all terms and conditions of this Agreement.

Additionally, Respondent proposed a grievance procedure, with several steps culminating in arbitration which on the first page is similar to the grievance procedure in the Local 157 contract. However, Respondent herein proposed a second page, containing limitations on the authority of the arbitrator, which are not contained in the prior agreement. They are as follows:

> The written arbitration request notice must be sent by the party requesting the same by fax transmission to the other party. Said notice shall be required to set forth the issues in detail, including which specific section of this Agreement is alleged to be breached. No moving party may arbitrates issues not set forth with specificity in their notice. The decision of the Arbitrator shall be final and binding on the Employee(s), the EMPLOYER and the Union. The powers of the Arbitrator are limited as follows:
>
> (a) He shall have no power to add to, or subtract from, or modify any of the terms of any agreement.
>
> (b) He shall have no power to establish wage scales or to change any wage.
>
> (c) He shall have no power to substitute his discretion for the EMPLOYER'S discretion in cases where the EMPLOYER is given discretion by this Agreement or by any supplementary Agreement.
>
> (d) He shall not have the power to provide agreement for the parties in those cases where they have in their contract agreed that further negotiations shall or may provide forcertain contingencies to cover certain subjects.

[53] See *White Cap Inc*., 325 NLRB 1166, 1169–1170 (1998).

(e) He shall have no power to set standards of production or operation, or to decide any question which, under this Agreement, it is within the responsibility of management to decide. In rendering decisions, the Arbitrator shall have due regard to the responsibilities of management and shall so construe the Agreement that there will be no interference with such responsibilities except as they may be specifically conditioned by the Agreement.

(f) The parties understand and agree that in making this contract they have resolved for its term all bargaining issues which were or which could have been made subject of discussion. The arbitral form here established is intended to resolve disputes between the parties only over the interpretation or application of the matters, which are specifically covered in this contract and which are not excluded from arbitration.

(g) Excluded from arbitration are unadjusted grievance which question the exercise of rights set forth in the Article of this Agreement entitled MANAGEMENT RIGHTS, or which question the application of any right over which the EMPLOYER is given unilateral discretion in this Agreement or over which the EMPLOYER has exercised discretion in the past.

(f) Excluded from arbitration are disputes and unresolved grievances concerning the discipline or discharge of employee(s) who violated the intent of the "No Strikes or Lockouts" Article of this Agreement.

Additionally, Respondent proposed a clause entitled seniority, which significantly differs from the Local 157 contract. It reads as follows:

ARTICLE
Seniority

SECTION A. Seniority, for the purpose of this Agreement, shall be by department and determined by the net credited service of the Employee by classification. Net credited service shall, mean continuous employment in the Company since the last date of hire less deductions for any unpaid time including but not limited to leaves of absence (including disability and worker compensation) and temporary layoff.

The foregoing seniority provisions are to be effective only if the production and efficiency of the Company is not impaired thereby, which determination is at the sole discretion of the EMPLOYER.

SECTION B. New Employees and those hired after a break in continuity of service will be regarded as probationary Employees for the first ninety (90) days of actual work and will receive no continuous service credit during such period, nor shall they be covered by any of the terms or conditions of this Agreement including the grievance and arbitration clauses. Such period may be extended by additional thirty (30) day periods upon timely written notice to the Employee by the Employer.

SECTION C. Reasons for termination, loss of seniority and recall right forfeiture include but are not limited to:

(1) Failure to notify the EMPLOYER of intent to return to work within two (2) working days after the date recall notice is sent to the Employee's last address on record with the EMPLOYER or failure to report for work within tow (2) working days after the date recall notice is sent to the Employee's last address on record with the EMPLOYER.

(2) If the Employee quites, or accepts a position with the EMPLOYER which is not included in the bargaining unit.

(3) If the Employee is discharged for cause.

(4) If the Employee is absent from work (AW0L) two (2) consecutive working days without advising the Company in advance and daily and giving reasons satisfactory to the Company for such absence.

(5) If the Employee overstays a leave of absence.

(6) If the Employee gives a false reason for a leave of absence or engages in other employment during such leave.

(7) If the Employee is laid off for a continuous period of two (2) months.

(8) If the Employee is laid falsifies pertinent information on his application for employment (which falsity may come to light after the Employee's date of hire or date of acquiring seniority).

SECTION D. The Union Steward shall be notified not less than one day prior to any layoff unless beyond the control or prior knowledge of EMPLOYER.

No benefits shall accrue nor contributions be required during any layoff or leave of absence unless required by law. Employees may elect to have contributory benefits continued by paying premium costs directly and in advance to _____.

SECTION E. For purposes of layoff Employee ability shall control. Where Employees have equal ability, seniority shall control. Determinations of Employee ability shall, remain the sole discretion of the EMPLOYER.

Moreover, the leave of Absence Clause proposal by Respondent, also differs substantially from that in the prior contract.[54]

ARTICLE
Leave of Absence

SECTION A. The EMPLOYER in its exclusive discretion may grant a written unpaid leave of absence where good cause is shown for a period not to exceed thirty (30) days, or in accordance with the Family Medical Leave Act or other pertinent statutes if applicable. Seniority shall not accumulate during leaves unless required by law. No Employee shall return to work prior to the expiration of his leave without permission and exclusive discretion of the EMPLOYER. An Employee who works for another EMPLOYER during his leave or who gives false reason for leave shall be disciplined up to and including discharge.

[54] The prior contract stated that a reasonable leave of absence "shall be given" to employees without pay for several listed reasons.

SECTION B. Any Employee who does not return or overstays a leave or absence, will be considered to have quit his employment, and if rehired, shall be considered a new Employee.

Finally, Respondent's proposal on wage increases, initially reads as follows:[55]

ARTICLE
Wages and Increases

SECTION A. All newly hired workers receive as a starting wage rate not less than the Federal minimum, as the same may be changed from time to time. Premium wage rates over and above the minimum wage rates may or may not be paid by EMPLOYER at its sole discretion.

SECTION B. There shall be no deduction from Employees' pay covered by this Agreement unless required and in the manner prescribed by law, or as mutually agreed to by the EMPLOYER and in writing by an Employee.

SECTION C. Employees shall be paid bi-monthly. There shall be no unreasonable delay in the payment of wages on payday.

When payday falls on recognized holiday, the day preceding the holiday shall be considered as payday.

SECTION D. Employees' pay shall be computed by multiplying the number of hours worked by the applicable rate.

SECTION E. No person shall suffer a reduction in his hourly rate of pay because of the adoption of this Agreement unless the Employee is performing a lower pay-rated job.

SECTION F. On each successive date as listed below all non-probationary Employees shall receive the following hourly wage increases:

199 , cents ($.) per hour;
199 , cents ($.) per hour;
199 , cents ($.) per hour;

SECTION G. The EMPLOYER may at its discretion grant individual merit increases in addition to the requirements of Section F above.

A careful reading of the interconnection of these proposals, reveals that although Respondent proposed seniority and arbitration clauses, it effectively negated the significance of either of these provisions, with regard to layoff, discharge, discipline, wage increases, and leaves of absence, as well as assigning work outside the unit. *Western Summit*, supra at 51–52; *Altorfer Machinery*, supra ALJD Slip op. at 31. Thus, the management-rights clause proposed, gives Respondent the "sole right to discipline and discharge for cause," provided that it is not in violation of terms of the Agreement. While the proposal goes on to add that complaints that the Employer violated this paragraph can be taken up this through the grievance procedure, this provision is nearly meaningless, in view of the fact that the grievance and arbitration clause states that the arbitrator has no power to substitute his discretion for the Employer's, in cases where the Employer is given discretion by this agreement. Thus, since Respondent is given discretion in the management rights clause to "discipline and discharge employees for cause", an arbitrator is effectively precluded from evaluating the fairness of Respondent's decision to discharge for just cause. Moreover, while Respondent's proposal does allow that paragraph to be taken up through the grievance procedure, that clause does not extend to arbitration. Indeed, other portions of the grievance proposal states that unadjusted grievances, which question the exercise of managements conduct in the Management-Rights clause, are excluded from arbitration. Thus, reading these clauses together, the Union can file a grievance over Respondent's decision to discharge for just cause, but that grievance will go nowhere, since management has discretion in this area, which cannot be contested, and even if it is subject to the initial steps, the issue is excluded from arbitration. Such a position is strongly indicative of bad faith. *Summit*, supra; *Altorfer Machinery*, supra.

Similarly, the seniority clause proposed by Respondent, contrary to past practice, provides for a seniority list, but eliminates its effectiveness, by providing for "sole discretion" by Respondent, in order for such seniority to have any meaning. Thus, the proposal states that for purposes of layoff, employee ability shall control, and seniority shall control only where employees have equal ability, which decision remains at the sole discretion of the Respondent. Thus, seniority is effectively eliminated as a factor in layoff, unless Respondent's decides in its discretion to consider it. Moreover, the Union is effectively precluded from grieving or arbitrating Respondent's exercise of its discretion in this area.

Similarly, the leave of absence provision gives Respondent exclusive discretion to decide whether to grant such leaves, which decision is also excluded from being tested in the grievance procedure.

Also, Respondent proposed that it have discretion to grant merit wage increases, a decision which also, cannot be effectively challenged by the Union. Finally, Respondent also proposed absolute discretion to retain temporary agency and contract labor employees to perform unit work as necessary and states that said workers shall be excluded from all terms and conditions of the contract.

Thus, based on these proposals, Respondent has precluded the Union altogether from a meaningful bargaining agent role with respect to personnel decisions. *Altorfer Machinery*, supra at 31. See also *Hydotherm*, supra at 994; *Burrows*, supra (no role of Union in merit raises, held indicative of bad faith, as well as provision for minimums to be determined by the Federal Minimum Wage), *American Meat*, supra. Insisting on a proposal to assign work to non-unit or casual employees, along with broad management rights clause, effectively prevented the Union from bargaining over loss of unit work).

To be sure, a Union may be willing to accept such comprehensive restrictions on the employee's rights, and such insistence is not per se unlawful. *Reichold Chemicals*, supra 288 NLRB at 71. However, the employer must be willing to give

[55] As related above, Respondent subsequently offered wage increases (Section F) of 25 cents an hour over 3 years.

up something significant in return. *HydroTherm*, supra. Here, Respondent was offering little more than the status quo in return for these sweeping waivers. *Hydrotherm*, supra.

The agreements reached by Respondent and the Union after 29 sessions, consisted of primarily minor issues, *Summit Health* supra, and on existing terms, such as vacations and holidays. In that regard, Respondent did offer and the parties agreed on two additional half days for holidays, which is the only economic improvement agreed upon by the parties.

Respondent rejected out of hand nearly all of the Union's proposals, *North Coast Cleaning Service*, 272 NLRB 1343, 1344 (1989) and very little progress was made in bargaining. That of course is not unlawful, in itself, but one must determine why? *Burrows*, supra ALJD Slip op. at 14. Here, the lack of progress is due in my judgment to the numerous acts of bad faith by Respondent both at and away from the bargaining table. I find that Respondent has not entered to or conducted negotiations with an intent to enter an agreement, and has not demonstrated the requisite desire to compose and compromise differences with the Union. At best, Respondent set out to impose, virtually unchanged, what it unilaterally decided at the outset was a fair set of terms and conditions. This is not good faith bargaining. *American Meat*, supra; *General Electric*, supra.

General Counsel also asserts that Respondent's proposals with respect to wages, health coverage, pension and subcontracting are "predictably unacceptable" "to the Union and therefore indications of unlawful surface bargaining. *Reichold*, supra.

With respect to wages, Respondent notes that its offer of 25-cents-an-hour over 3years, amounts to a 9–10 percent increase over the length of the contract. However, as General Counsel correctly points out, this offer was coupled with an insistence of no retroactivity, where the employees had not received reason for 7–9 years. Indeed, the last scheduled wage increase under the last Local 157 contract was 40 cents an hour effective March 2 1990. I also note in this connection that Respondent had implicitly promised to raise its offer, by telling the Union when it made its offer that its offer "was as low as Union's offer is high."

However, on the other hand, I note that the Union did not make substantial movement on their initial wage offer. In fact, their only change from their initial offer of 7 percent, 6 percent, and 6 percent with substantial increases in minimum salaries was made on August 9, 2000, when it proposed slightly higher general increases of $2, $1, and $1 and increases in minimum, while dropping its prior proposal for lump-sum payments and retroactivity prior to July 1, 2000.

Therefore, in these circumstances, I cannot conclude that Respondent's bargaining on wages was "predictably unacceptable", to the Union, even taking into account the other indications of bad faith by Respondent, as detailed above.

Turning to Health Care, Respondent's bargaining vacillated back and forth between two proposals, and it took several meetings to clarify what it really was proposing. Thus, at one point it proposed paying 15 percent of coverage for all coverage, and than later changed to 20 percent of single coverage only. Finally, after several requests by the Union, Ellman confirmed that it was offering to pay 20 percent of single coverage only in the plan currently covering nonunit employees and a few unit employees.

Respondent argues that this change represents movement on its part. I do not agree. In fact, in my view, that represented, if anything, a regressive offer by Respondent's, inasmuch as the premiums for family coverage are substantially higher than for single coverage.[56]

Respondent also asserts that although this offer does represent a high co-pay for employees, it does represent a significant improvement for employees, since employees at that time, had no coverage whatsoever. Respondent's characterization of current practice is not precisely accurate. Thus, it is useful to trace the history of health care for Respondent's employees. The employees apparently had coverage for some time under the Local 157 contract, but this coverage was cancelled in January of 1993.[57] Although, at least some employees had coverage prior to 1993, the prior decision reflects that some employees were not receiving such coverage as early as late 1991. Thus in early 1994, employees began complaining about lack of medical and other benefits, as well as a lack of effective representation by Local 157, which led to the RD petition and the organizing on behalf of Local 455. The record also reflects that Respondent's president, Giacomo Abatte, (father of Connie Pezulich), promised employee Rivera (through Supervisor Toussaint) that Rivera would receive medical coverage and a raise if he did not come to the hearing again.[58] Moreover, the decision also found that employee Dargan, after his health coverage was cancelled in January of 1993, personally asked to be covered because of a health problem in his family. Respondent agreed at that time, and placed him under a policy that Respondent had with another carrier for some of their employees.

However, the record revealed that on March 17, 1994, Dargan was told by Connie Pezulich that Dargan's policy would be cancelled in 30 days "unless this matter with the Union was cancelled." Thirty days later, that policy was cancelled.[59] The ALJ found, and the Board affirmed, that this conduct by Respondent violated Section 8(a)(1) and (3) of the Act.

Further, at the time negotiations began, Respondent's health policy with Aetna which covered nonunit employees, had been extended to four unit employees, three of whom were provided family coverage, and one single coverage. It does not appear that any portions of these premiums were paid by the employees.

Therefore, the above evidence discloses that lack of medical coverage was a key issue in the employees' decision to abandon Local 157 and to select Local 455 to represent them. It also discloses that in the past Respondent did provide medical coverage to employees, without charge until 1993, and since

[56] In that regard, the coverage, as of May 25, 2000 cost $234.40 for single coverage and $577.20 for family coverage. When bargaining began these figures were $185.70 and $452.40, respectively.

[57] As per the prior *Regency* decision. The record does not reflect whether Local 157 protested this cancellation at the time.

[58] Rivera had appeared at the representation hearing in the RD case, wherein Local 455 participated.

[59] Dargan was as noted the RD petitioner, as well as the shop steward for Local 157.

then, it has periodically provided such coverage to some employees, again without cost, covering four unit employees when bargaining started.[60]

Thus, Respondent is not accurate when it asserts that employees received no coverage when bargaining began. To be sure, covering 28 employees with an 80–85 percent copayment is more costly then covering 4 employees without a copayment, but the difference is not as substantial as Respondent suggests, when it argues incorrectly employees had received no coverage at all.

In my judgment, Respondent's offer to provide coverage, but to require an 80–85 percent copayment from employees is akin to no offer at all in these circumstances. These are, as Respondent itself points out, low-wage employees, who would not be likely be able to afford to pay 80–85 percent of $457.40 per month for family coverage, or 85 percent of single coverage of $185.70 per month.[61]

Yet Respondent made no movement on its offer in this area, even though the Union made substantial movement by withdrawing its proposals that Respondent participate in the Union health plan, and agreeing to participate in Respondent's plan, but with no co-pay. Surely, if Respondent had any intention of persuading the Union to accept their health plan offer, it would have made some movement on its 80–85 percent copayment. It failed to do so, and continued to maintain its "take it or leave it" stance, exemplified by Ellman's comments, such as "I'm going to say no to everything", and "you want a contract, we don't." In light of this conduct, as well as the other evidence of bad faith disclosed above, I conclude that Respondent's bargaining on health care was "predictably unacceptable" to the Union, and further evidence of its bad-faith bargaining.

However, I cannot conclude as General Counsel asserts, that Respondent's bargaining on pension and subcontracting can be similarly characterized. As to pension, it is true that Respondent rejected all of the Union's different proposals for pensions, and never offered one of its own. While in some sense, this can be characterized as "unlawful take it or leave it bargaining," on the other hand, it can also be construed as lawful hard bargaining. I note that an employer is not required to offer a pension plan, and Respondent's employees never had one in the past, which I deem highly significant. Thus, this was a new costly benefit being demanded by the Union, and particularly in light of the admitted financial problems Respondent was suffering,[62] as well as the $30,000 that it spent on repairs due to safety problems uncovered by the Union's inspection, I cannot conclude Respondent was "unreasonable", in rejecting the Union's pension requests.

I also note the Union's failure to supply the Respondent with minutes of the Trustees meetings, as it requested. I do not agree with the Union's position that these minutes were confidential, and I do agree with Respondent, for the reasons expressed by Ellman that the minutes might contain material relevant to Respondent's evaluation of the union's pension proposal. While it may not have been a violation of Section 8(b)(3) of the Act for the Union, not to turn the minutes over, since the Union did not have them, and the Funds are not the same identity as the Union,[63] nonetheless, I believe that the Union should have and could have made some effort to persuade the Funds to turn over this information. Indeed, not only did it fail to do so, but maintained the position that that material is confidential and or Respondent had sufficient information to make a decision on pension. Thus, whether or not the Union's conduct violated Section 8(b)(3) of the Act, I conclude that it did contribute to the delay in bargaining and hampered bargaining over pension. I therefore rely on this fact, as well, in concluding that Respondent's position on pension was not "predictably unacceptable" to the Union, nor evidence of bad faith.

However, in this regard, I cannot conclude as Respondent argues that this alleged "bad faith" by the Union, excuses the overwhelming evidence of bad faith by Respondent, which I have detailed above, I find that this conduct affected pension bargaining only, contrary to Respondent's assertion that it affected its bargaining in other areas as well. In fact, I believe that Respondent's position during bargaining that the failure to produce these minutes, prevented it from making *any* economic offers, which position it maintained well into bargaining, was not made in good faith, and was simply a further attempt to delay bargaining. While I have found the minutes potentially relevant to pension issues, even there, Respondent had sufficient information to make a decision on that issue, and in fact, decided to totally reject pension participation, while continuing to maintain that it wanted this information. Indeed, Ellman's own testimony establishes that Respondent after initially seeking the information in part, to assess the Union's pension proposals, decided to reject them anyway, without such information, and to put its money into the wage and health offers that it had already made. Moreover, Respondent adduced no evidence of any connection between the absence of such information, and its ability to make economic offers, other than pension.

Further, Respondent contends that the Union violated Section 8(b)(3) of the Act by seeking to expand the unit. In that regard, although the Union initially proposed to change the certified unit somewhat, it withdrew that position quickly, and agreed to certification language. Moreover, the evidence discloses that very little bargaining time was spent on this proposal. Thus, this position cannot be said to have substantially affected bargaining and cannot be found to have excused the egregious bad faith exhibited by Respondent as detailed above.

Finally, General Counsel argues that Respondent's "desire to have unlimited subcontracting and its unwillingness to consider any restrictions would be a dangerous provision for any Union to agree with." However, I note that Respondent had subcontracted work in the past, without apparent objection from the prior union, and it explained to the Union during negotiations that Respondent's competition, also subcontracts work as a

[60] Although the prior Board decision, required Respondent to reinstate Dargan's medical insurance, it is not clear if it ever did so. The record reflects that Dargan had ceased being employed by Respondent when bargaining began.

[61] These figures were increased to $573.20 and $234.40, respectively, by the end of negotiations.

[62] In that regard, I note that Respondent was forced to cut the workday twice over the course of bargaining.

[63] *American Commercial* Lines, 291 NLRB 1084-1085 (1988).

regular practice. Thus, whether or not as General Counsel argues, that unlimited subcontracting, would be a "dangerous provision for the Union to agree with", is not sufficient to establish bad faith, as opposed to legitimate "hard bargaining" on this issue.

Lastly, General Counsel argues that Respondent's bad faith is further established by its inconsistent and shifting positions on which employees and positions were in the unit. I agree. As detailed more fully above, Respondent kept changing its position as to the classification of "sprayer", as well as the eligibility of employees Lopez, Lacona, Guerrero, and Rumph. The record reveals no real explanations for these changes of position, and the assertion that they were merely "mistakes" is not persuasive. It seems that Respondent sought to include employees in the unit when their vote was challenged or when they were put on the Excelsior list at the recent RM election, but during bargaining, Respondent insisted that they were not in the unit.

Rumph's situation is not the same. In his case, Respondent was not accurate in listing his classification, and the Union questioned Respondent's inconsistent positions, when the work reduction issue arose. I note that Respondent after making a rather feeble attempt to justify its failure to notify the Union of an "alleged" classification change for this employee, made the comment, "should you feel Mr. Rumph should have also been affected by the reduction of hours for the 'general helper' classification, we would certainly consider obliging such request." This obvious attempt to implicitly threaten the Union with adverse consequences if it continued to pursue its bargaining obligations, is a further example of Respondent's bad faith, and consistent with its numerous attempts, as disclosed above, to denigrate the Union in the eyes of the employees.

So in sum, I conclude that the totality of Respondent's conduct both at and away from the bargaining table, demonstrate that "it intended to frustrate negotiations, and prevent the successful negotiations of a bargaining agreement," *Mid-Continent Concrete*, supra Slip op at 4, and or alternatively its "conduct manifested an intent to undermine employee support for the Union and enable it to impose, virtually unchanged, what it unilaterally decided at the outset was a fair set of terms and conditions of employment." *American Meat*, supra at 839.[64]

Respondent has therefore refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act. I so find.

CONCLUSIONS OF LAW

(1) The Regency Service Carts, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(2) Shopmen's Local Union No. 455, International Association of Bridge Structural and Ornamental Iron Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

(3) At all times material herein, Local 455 has been the exclusive collective-bargaining representative of Respondent's employees in the following unit appropriate for the purposes of collective-bargaining:

> All full-time and regular part-time employees, including production and maintenance employees, polishing, pressing, plating, and shipping and receiving employees, employed by Respondent at its Brooklyn facility, excluding carpenters, drivers, salespersons, office clerical employees, guards and supervisors as defined in the Act.

(4) By refusing to provide relevant information to the Union in a timely fashion, Respondent has violated Section 8(a)(1) and (5) of the Act.

(5) By failing and refusing to bargain in good faith with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.

(6) The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist there from and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent bargain in good faith with the Union, and if an understanding is reached, embody it in a signed agreement.

Inasmuch as I have found above that Respondent has bargained in bad faith with the Union from the inception of bargaining, I shall recommend that the certification extended by one year from the date that good faith bargaining begins. *Altorfer Machiner,y* supra, ALJD Slip Op at 3; *Bryant & Stratton*, supra at 1007, 1045. On the foregoing findings of fact and conclusions of law, and based upon the entire record, I issue the following recommended[65]

ORDER

The Respondent, Regency Service Carts, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely furnish Shopmen's Local Union No. 455 International Association of Bridge Structural and Ornamental Iron Workers, AFL–CIO (the Union), with information it had requested which information is necessary to the Union's statutory duty as exclusive collective-bargaining representative of its employees.

[64] Other authority supporting these conclusions include *Altorfer Machinery*, supra at 37 ("Respondent engaged in take it or leave it bargaining, with no meaningful effort to accommodate differences with respect to statutorily important subjects and to reach a final contract on terms other than those predetermined by Respondent"); *U.S. Ecology* supra, *Burrows*, supra; *Summa Health, supra; Bethea Baptist, supra; Bryant & Stratton*, supra; *Hydrotherm*, supra; *Tennessee Construction*, supra; *Radisson Plaza*, supra; *Langston*, supra; *Borg Warner*, supra.

[65] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Engaging is surface and bad faith bargaining with the Union which is the certified exclusive collective-bargaining representative of employees in an appropriate unit of

> All full-time and regular part-time employees, including production and maintenance employees, polishing, pressing, plating, and shipping and receiving employees, employed by Regency Service Carts, Inc. at its Brooklyn facility, excluding carpenters, drivers, salespersons, office clerical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the above-named labor organization, as the exclusive representative of all employees in the certified appropriate bargaining unit set forth in paragraph 1(B) above, and embody any agreement reached in a written contract. The certification shall extend 1 year from the date that such good-faith bargaining begins.

(b) Within 14 days after service by the Region, post at its place of business copies of the attached notice marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent duly authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. It shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, it has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by it any time since November 28, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that it has taken to comply.

Dated, Washington, D.C. December 27, 2002

[66] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail to timely furnish Shopmen's Local Union No. 455 International Association of Bridge Structural and Ornamental Iron Workers AFL–CIO, (the Union) with information it requests which information is necessary to the performance of the Union's statutory duty as exclusive collective-bargaining representative of our employees.

WE WILL NOT engage in surface or bad-faith bargaining with the above named Union which is the bargaining agent for our employees in the following certified appropriate bargaining unit.

> All full-time and regular part-time employees, including production and maintenance employees, polishing, pressing, plating, and shipping and receiving employees, employed by Regency Service Carts, Inc. at its Brooklyn facility, excluding carpenters, drivers, salespersons, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, upon request, bargain in good faith with the above-named union, as the exclusive representative of our employees in the above-described certified bargaining unit, and embody any agreement reached in a written contract. The certification year shall extend 1 year from the date that such good-faith bargaining begins.

REGENCY SERVICES CARTS, INC.